No. 20770

In the

United States Court of Appeals

For the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation; MANTRET, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation; BORG-WARNER CORPORATION, an Illinois corporation; CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation, RADIO CORPORATION OF AMERICA, a Delaware corporation; WHIRLPOOL CORPORATION, a Delaware corporation; MAYTAG COMPANY, a Delaware corporation; MAYTAG WEST COAST COMPANY, a California corporation; GENERAL MOTORS CORPORATION, a Delaware corporation; FRIGIDAIRE SALES CORPORATION, a Delaware corporation; NORGE SALES CORPORATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,

Defendant.

Opening Brief of Appellees Borg-Warner Corporation and Norge Sales Corporation

On Appeal from the United States District Court
for the Northern District of California

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I.

INTRODUCTION

The present appeal is from the Judgment on Directed Verdict and Order Dismissing Complaints entered by the United States District Court for the Northern District of California on Novem-

ber 24, 1965 in Civil Actions Nos. 39336 and 42674.[1] Pursuant to said judgment appellee Borg-Warner Corporation was dismissed as a defendant, its motion for a directed verdict having theretofore been granted (R. 1977-1978).[2] All other appellees, *except Norge Sales Corporation*,[3] likewise made motions for directed verdicts which were granted. The judgment entered on November 26, 1965 does not mention Norge Sales, nor does it purport to determine that corporation's liability to appellants in any way.[4] The situation with respect to Norge Sales is explained and discussed in the following section of this brief.

This brief deals only with the facts, law, rulings, and alleged errors of the proceedings in trial court which relate to appellees Borg-Warner and Norge Sales. No attempt has been made to discuss the many points of claimed error set forth in Appellants' Specification of Errors and Opening Brief which do not directly involve these appellees. Matters relating to the W. J. Lancaster Co. (an alleged co-conspirator) are also discussed whenever Norge products are involved. (Lancaster was the independent distributor of Norge products in northern California during the relevant period of time.) To the greatest extent possible, consistent with protection and preservation of the rights of appellees Borg-Warner and Norge Sales, duplication of points made in the briefs filed by other appellees is avoided. Where matters claimed to be prejudicial error are common to *all* appellees, Borg-Warner and

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1. Both actions were consolidated for trial pursuant to the Further Pretrial Order filed in said actions on August 13, 1965 (R. 1608-1609).

2. For convenience of reference, abbreviations in this brief with respect to the Reporter's Transcript, Clerk's Transcript and Exhibits are the same as used by appellants. Thus, the reporter's transcript is "Tr."; clerk's transcript is "R"; Plaintiff's Exhibits in evidence are "Pl.Ex.No."; plaintiffs' Exhibits marked for identification but not in evidence are Pl.Ex.for Id.No."; Transcript of pretrial hearings are "P.Tr."; reference to appellants' opening brief is designated "Br."; and the Specification of Errors is "Sp. of Err.".

3. Hereinafter, Borg-Warner Corporation will be referred to as "Borg-Warner", and Norge Sales Corporation will be referred to as "Norge Sales".

4. Subsequent to the hearing on taxation of costs, an additional page was added to the judgment of November 26, 1965 (R. 1979). This page is a listing of costs allowed the various defendants showing Norge Sales was allowed $20.00.

Norge Sales hereby refer to, and incorporate the authorities and arguments presented in the briefs of other appellees.

Thus, the following numbered Specifications of Error are not discussed herein because thoroughly discredited and disposed of by the briefs of other appellees herein:

II (Order requiring separate verdict on issue of liability before trial on issue of damages);

III (Pretrial order delineating issues to be tried);

IX (Taxation of Costs).

Numerous specifications of error are asserted by appellants which do not pertain to Borg-Warner or Norge Sales. No attempt has been made to reply to such alleged errors. Specifications of Error VI and VII and subdivisions thereof fall within this category.

Other specifications of error only partially relate to or involve Borg-Warner or Norge Sales. In such instances only such portions of the alleged errors as apply to these appellees are discussed. (e.g. Exclusion of Evidence, Exclusion of portions of Alpine Deposition, Discovery orders, Sp. of Err. V A-I, and VIII A-G.)

II.
STATEMENT OF JURISDICTION

A. As to All Appellees Except Norge Sales.

This court has jurisdiction of the present appeal with respect to all appellees except Norge Sales, pursuant to 28 U.S.C., §§ 1291 and 1294(1).

B. As to Norge Sales, This Court Lacks Jurisdiction of the Appeal, Because a Timely Notice of Appeal From the Summary Judgment in Favor of Norge Sales Was Not Filed.

This court may always consider the question of its jurisdiction of an appeal, even though the question is not raised by a special motion to dismiss the appeal. *Tomlinson v. Poller*, 220 F.2d 308 (5th Cir. 1955), *cert. denied*, 350 U.S. 832 (1955); *Budke v. Kaiser-Frazer Company of Alaska*, 275 F.2d 217 (9th Cir. 1960). The court may dismiss an appeal for want of jurisdiction upon its own motion. 36 C.J.S. *Federal Courts*, § 296(20).

Norge Sales,[5] not named as a defendant in action No. 39336, was dismissed as a defendant in action No. 42674 pursuant to a summary judgment entered by the trial court on June 14, 1965, upon the grounds that said action was barred as to Norge Sales by the applicable Statute of Limitations (R. 165-166).

The partial summary judgment in favor of Norge Sales contained no express determination that there was no just reason for delay, and no express direction for entry of judgment. Therefore, under Rule 54(b) F.R.Civ.P. the judgment was subject to modification or revision at any time prior to the entry of judgment on directed verdict entered on November 26, 1965. Accordingly, appellants could not appeal from this summary judgment in favor of Norge Sales prior to the final judgment determining all the claims of all parties. *Miles v. City of Chandler*, 297 F.2d 690 (9th Cir. 1961). However, when appellants did appeal from the final judgment, they had the obligation of expressly noticing an appeal from the summary judgment dismissing Norge Sales, if they wished to make said defendant an appellee (F.R.Civ.P. 73(b))[6] This appellants did not do.

Thus, the notice of appeal filed herein on December 1, 1965 states in full as follows: "Notice is hereby given that plaintiffs, UNITED SHOPPERS EXCLUSIVE and MANFREE, INC. hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 26, 1965."

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5. At all times material to this appeal Norge Sales was a subsidiary of Borg-Warner. Said company was organized under the laws of Indiana in December, 1954 and originally until about January 1, 1960, about eighty percent (80%) of its stock was owned by Borg-Warner and the remaining twenty percent (20%) by Judson Sayre and Associates. Commencing about January 1, 1960 Borg-Warner owned one hundred percent (100%) of the stock of Norge Sales and four out of five of the directors of Norge Sales have likewise been directors of the parent company, Borg-Warner, the remaining directors being Mr. Sayre and his successors (Tr. 2489-2491, B-W Ex.No. 9001).

6. Rule 73(b) of Federal Rules of Civil Procedure provides in pertinent part that the notice of appeal "shall designate the judgment or part thereof appealed from . . ." The notice of appeal filed by appellants designates only the judgment on directed verdict as the judgment from which appellants appeal. The separate judgment dismissing Norge Sales which was entered on June 14, 1965 is not appealed. No notice of appeal from said judgment has ever been filed.

(R. 2048) Said final judgment on directed verdict expressly deals only with those defendants who moved for direct verdicts. Obviously, Norge Sales was not such a defendant.

The effect of Rule 54(b) is to establish the period of time within which a notice of appeal from a partial summary judgment may be filed. Here that period commenced to run on the date of entry of the Judgment on Directed Verdict, November 26, 1965. It is submitted that Rule 54(b) cannot be used by appellants as an excuse for failure to file a timely notice of appeal from the summary judgment in favor of Norge Sales.

It is well settled that the timely filing of a notice of appeal is jurisdictional. *Napier v. Delaware, Lackawanna & Western Railroad Company*, 223 F.2d 28 (2d Cir. 1955); *Knowles v. United States*, 260 F.2d 852 (5th Cir. 1958). Since no notice of appeal from the summary judgment in favor of Norge Sales was filed within the time allowed by the Rules, it is respectfully submitted that this court lacks jurisdiction over any appeal from said summary judgment.

III.

STATEMENT OF THE CASE

A. The Issues.

Two complaints were filed by appellants, the first on August 12, 1960; and the second on August 4, 1964. Both contain substantially the same allegations, the second complaint simply dropping several of the original defendants, and adding several new defendants, among which was Norge Sales.[7] Essentially the second complaint is a supplemental complaint alleging the same antitrust conspiracy and seeking additional damages covering a four-year period of time subsequent to the filing of the first complaint.

The complaints in both actions allege violations of the Sherman Act, 15 U.S.C., §§ 1 and 2. Appellees and alleged co-con-

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7. Those defendants named in the first complaint but not the second were Westinghouse Electric Supply Co., Sylvania Electric Products, Inc., and Frank H. Edwards Company. The new defendants named in the second complaint were Norge Sales Corporation, Calectron and Zenith Sales Corporation (R.1, 15).

spirators are charged with having restrained and monopolized interstate trade by 1) contracting, combining, conspiring and agreeing to restrain and monopolize interstate trade and commerce in the distribution and sale in San Francisco of television receiving sets and major household appliances such as washers, ranges, and refrigerators, 2) having performed a wide range of acts pursuant to and in furtherance of such a conspiracy, and 3) having prevented appellants, Manfree, Inc. (hereinafter Manfree) and United Shoppers Exclusive (hereinafter U.S.E.) from obtaining the television sets or major appliances manufactured by appellees and alleged co-conspirator manufacturers. Appellants alleged damages in the total sum of $1,500,000.00 and prayed that said amount be trebled pursuant to 15 U.S.C., § 15, and further prayed for injunctive relief.

The trial court made its "Further Pretrial Order" on August 13, 1965 (R. 1608-1609). This order set forth the ultimate issues to be tried in both actions as follows:

> "a. Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?
>
> "b. Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?"

These issues are precisely those raised by appellants in both of their complaints. Contrary to appellants' statement (Br. p. 14), the trial court did not limit the issues to be tried to a "horizontal conspiracy" as that term is commonly understood in antitrust law. Thus, appellants were not restricted to showing agreement between competitors on the same functional level of competition.

The Memorandum Opinion of the trial court reflects the careful scrutiny given to all the evidence produced by appellants with respect to the above issues without regard to whether such evidence involved manufacturers, or distributors, or retailers, or a

combination of these different levels of competition (R. 1912-1976).[8]

B. The Plaintiffs.

The plaintiffs (appellants herein) in these actions are U.S.E., a so-called discount department store located on Alemany Boulevard in San Francisco, California; and Manfree, a corporate lessee of space in the U.S.E. building which operates the major appliance and television concession.

The U.S.E. store opened for business on March 7, 1957, and the major appliance concession was then operated by a company called United Appliance Company. Among other products sold by this concession was the Norge brand of home appliances (Tr. 5705, 5711). United Appliance Company continued to operate as the major appliance concessionaire of U.S.E. for approximately two months. In May, 1957, Manfree was organized to take over the operations of United Appliance Company when the latter firm encountered financial difficulties (Tr. 5708, 5712 and 5995). U.S.E. itself has never purchased any major appliances or television sets (Tr. 5994).

U.S.E. commenced operations as a "closed door" discount house, that is, purchasers were required to be "members". To qualify for membership two requirements had to be met. First, the applicant had to be a person within certain specified groups, to wit, veterans, government employees, or union members. Second, payment of a $2.00 fee was required.[9] Membership cards were not supposed to be loaned to non-member persons outside of the member's family (Tr. 5997, 6190, 6201-6206).

Throughout the applicable time period, 1957-1964, the number of concession lessees at U.S.E. ranged from twelve to fifteen cov-

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8. For example, note the trial court's analysis of the evidence with respect to the relationship between R.C.A. and the local distributor of R.C.A. products (R. 1923-1925), and that between Frigidaire Sales Corporation and the alleged co-conspirator retailers (R. 1947-1948).

9. The restricted membership feature of U.S.E. continued until January, 1960. Membership then became open to anyone upon payment of the $2.00 fee. In September, 1961, "membership" was dispensed with entirely and U.S.E. has since been an "open door" discount store (Tr. 5999-6000, 6201-6202).

ering a variety of merchandise (Tr. 5993). Manfree, as one of these lessees, occupied a small amount of floor space within the U.S.E. building.[10]

C. The Defendants.

1. GENERALLY.

The complaint in action No. 39336 originally listed numerous defendants on all levels of distribution. These included eleven national manufacturers of major home appliances and television sets, including appellee Borg-Warner; nine wholesale distributors of such products, some being subsidiaries of manufacturers such as Maytag West Coast and Frigidaire Sales Corporation, and some being totally independent companies as the Meyberg Company, California Electric Supply, and W. J. Lancaster Co.;[11] and five retail stores in San Francisco (R. 1). Defendants dismissed before trial were thereafter referred to as alleged co-conspirators.

2. BORG-WARNER AND NORGE SALES.

Borg-Warner, at all times material to this litigation, was an Illinois corporation which manufactured Norge brand major appliances. The manufacturing division of Borg-Warner responsible for these operations was designated the "Norge Division". This was an operational division and not a separate company (Tr. 2493-2494). Judson Sayre was "chief executive officer" of this division of Borg-Warner and at the same time was president of Norge Sales. However, he was not a corporate officer of Borg-Warner (Tr. 2501-2503).

Borg-Warner manufactured variations of Norge appliances. These models were referred to by various names such as "MP models" or "Key Account Models" or "Deviation Models" (Tr. 2700, 2960). Borg-Warner sold its entire output of Norge appliances, including any special models, to Norge Sales (Pl. Ex. No.

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10. At the start of its operation, Manfree occupied approximately 1400 square feet of floor space and subsequently increased that space to approximately 2000-2200 square feet (Tr. 5984-5985).

11. W. J. Lancaster Co. will hereinafter be referred to as "Lancaster." This is not to be confused with the individual, Mr .William J. Lancaster, the president of the company, who will be referred to as "W. J. Lancaster."

1775). The special or deviation models might be stripped down versions of other Norge models, such as machines with less chrome (Tr. 836-837). Neither Borg-Warner nor Norge Sales were shown to have any policies concerning what use could be made of such models by the distributors of Norge products. They were, in fact, used by distributors as promotional items to build interest in Norge products by new and old accounts alike (Tr. 2700; Pl. Ex. No. 4089).

Though Norge Sales was not named as a defendant in Action No. 39336, it was subsequently made a defendant in Action No. 42674. Appellants alleged that Norge Sales was an agent and affiliate of the defendant, Borg-Warner (R. 15, 18).

As noted earlier, Norge Sales was a separate corporation created in 1954 to market Norge brand products. It has always been conceded that Norge Sales was a subsidiary of Borg-Warner (R. 86, Tr. 2490). But, throughout this litigation Borg-Warner has contended, and still does contend, that it is entitled to recognition of its separate entity, and that it is not responsible for the acts and decisions of its subsidiary absent a showing of agency, or grounds for disregarding the corporate entity of Norge Sales. The record reveals that this "separate entity" question was a continual point of contention between counsel for appellants and Borg-Warner (Tr. 2386, 2633, 2834).

The trial court found it unnecessary to decide this issue.[12] Therefore, in this brief, it is *assumed*, as the trial court assumed, that the acts and declarations of representatives of Norge Sales are attributable to Borg-Warner. Even construing the evidence in this light,

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12. Contrary to appellants' statement that the separate entity point was "found to be without merit" (Br., p. 127) the trial court simply stated in its memorandum opinion:

> "Borg-Warner's contention that it is a separate corporate entity and that the evidence is insufficient to go to the jury on the question of Borg-Warner's responsibility for the activities of Norge Sales appears to the Court to be without merit; however, assuming that Borg-Warner may be held responsible for the activities of Norge Sales, there is insufficient evidence in this case from which a jury could reasonably or fairly infer that Norge Sales participated in the conspiracy charged. *Under the circumstances, any discussion concerning the separate corporate entities of Borg-Warner and Norge Sales is moot.*" (Emphasis added.) (R. 1962)

that most favorable to appellants, there is no evidence of knowledge or participation by Borg-Warner in any conspiracy or combination to boycott U.S.E. or Manfree or to violate any antitrust law.

It is only necessary here to note that throughout the trial, counsel for appellants seized every opportunity to confuse the names "Norge Division" and "Norge Sales Corporation". (See for example Tr. 2935-2937). The same procedure has been followed in appellants' opening brief.[13]

The instances cited in footnote 13 are only a few examples of the deliberate attempt by appellants' counsel to confuse the Norge Division of Borg-Warner with the separate company named Norge Sales Corporation. The record of the trial court proceedings with respect to Borg-Warner is understandable only when this "corporate entity" issue is made apparent.[14] No more need be said about this issue on this appeal.

At no time did Norge Sales sell directly to retailers. Rather, it sold entirely to independent distributors operating under franchise agreements and located in principal cities throughout the country (Pl. Ex. Nos. 1771, 1772, 1775). There were four such independent distributors of Norge products in California during the period 1958 to 1964 (Tr. 2916). Lancaster in San Francisco became the

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13. For example, at pages 40 and 128 the witness, Gene Schick, is described as a factory regional representative of Borg-Warner. The evidence is uncontradicted that Mr. Schick was the western regional manager of Norge Sales (Tr. 2367, 2913, 2919); at page 82, it is claimed that a certain document (Pl.Ex. for Id.No. 431) came from Borg-Warner's files. This exhibit shows on its face that it was produced from the files of Norge Sales and counsel for Borg-Warner so stated. At page 118, appellants assert: "Borg-Warner's Norge Division directly participated in the boycott of Manfree (Tr. 2590-2592)". The reference is to a meeting at the Villa Hotel in San Mateo, California in April, 1959, at which Harold Bull and Gene Schick were present. These gentlemen were employees of Norge Sales (Tr. 5365-5366, 5384, 2913). No representative of Borg-Warner was present at the Villa Hotel meeting. At page 128, appellants state that Borg-Warner promulgated price sheets to Norge dealers showing retail list prices. The price sheets in evidence are those of Norge Sales (Pl.Ex.No. 1924; Tr. 2666).

14. Thus the portions of the deposition of Judson Sayre read into evidence at the trial by appellants (Tr. 2474-2571) were devoted almost entirely to this issue.

franchised dealer for Norge products in northern California in 1955 (Tr. 2363-2364).

Neither Borg-Warner or Norge Sales exercised or attempted to exercise any control whatever over the disposition of Norge appliances which had been sold to independent distributors like Lancaster. Once the merchandise was delivered to a transportation company in good order by Norge Sales the risk of loss or damage passed to the distributor (Pl. Ex. Nos. 1924 F, O, Q; 46; 47; 48).

There was no evidence that Borg-Warner or Norge Sales dictated or attempted to control the business policies or judgments, or methods of operation of its independent distributors. The distributors on their part agreed with Norge Sales that they would concentrate their best sales efforts within the designated territory so as to give complete and satisfactory coverage in the territory with regard to the sale and service of Norge products, and also agreed not to engage in any business or advertising practice which would be in violation of any better business bureau policy or of any local ordinances which might serve to destroy or damage any goodwill attached to the name of "Norge" (Pl. Ex. Nos. 46, 47, 48).

Appellants in an attempt to implicate Norge Sales in a conspiracy repeatedly refer to a meeting at the Villa Motel in San Mateo, California, at which representatives of Norge Sales were present (Br. pp. 51-52, 90, 101, 127). The facts surrounding this meeting as shown by uncontradicted evidence are as follows. Commencing in February 1958 Norge Sales instituted its "Consumer Protection Policy." This procedure was established to ensure that purchasers of Norge products would receive the benefit and protection of the manufacturer's warranty (Pl. Ex. No. 4019). Under this plan a purchaser of a Norge machine in San Francisco could look to the local distributor, Lancaster, for parts and service under the warranty, even though the appliance may not have been sold by Lancaster. In order to provide the distributor with funds to carry out this warranty service, a fixed amount of the price of each Norge appliance was "built in" to the purchase price and retained by the distributor as a service reserve. If another distributor had made the sale, obviously the distributor in the ultimate purchaser's

home area would not have money to provide the warranty service (Tr. 5380-5381).

In approximately April, 1959, Mr. Gilbert Freeman, then the general sales manager of Lancaster, learned that there were Norge appliances at U.S.E.[15] Freeman instructed his salesman to get the serial numbers of these appliances. It was then determined by Freeman that Lancaster had never handled these items and this fact was reported to Schick, the western regional manager of Norge Sales (Tr. 2717-2719, 2966-2968). Schick checked the serial numbers with the Chicago office of Norge Sales and then reported to Freeman that the merchandise was part of a carload which had been originally shipped to Graybar in Los Angeles, and then transshipped to San Francisco (Tr. 2719, 2969-2971, 5373).

Freeman then put out a bulletin to the Lancaster personnel that warranty parts and service on these machines were not to be provided by Lancaster (Tr. 2719). Mr. Bull, vice-president in charge of sales of Norge Sales, caused a debit memo of $17.50 to be issued to Graybar reflecting the deduction of a portion of the money received by Graybar for sale of one of the subject appliances. This same amount would then be credited to Lancaster for warranty service (Pl. Ex. Nos. 4011, 4014; Tr. 2977-2980).

This brought forth a complaint from Mr. Bonnet, the sales manager of Graybar, addressed to Bull, saying that Graybar hadn't demanded the warranty money when other Norge distributors had shipped goods into the Los Angeles area, and that Lancaster ought to forget it. In this letter Bonnet suggested a meeting between himself, Bull and Freeman to discuss the matter (Pl. Ex. No. 4023).

It happened that Bull was then traveling around the country attending various product showings. One was scheduled for April 29, 1959 at the Villa Hotel in San Mateo. Bull instructed his correspondent in Norge Sales, Mr. Berthold, to send telegrams

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15. Manfree had been a Lancaster customer with respect to Norge appliances during the period May-September 1957 (Tr. 2581). Lancaster had dropped Manfree as a customer a year and a half before this incident occurred because of U.S.E.'s use of "bait and switch" advertising in connection with Norge products (Tr. 2866-2869).

to Bonnet and Freeman to arrange a meeting to discuss this "transshipment" problem (Tr. 2717, 2726, 5375-5380; Pl. Ex. No. 4029).

Present at the meeting at the Villa Hotel were, Messrs. W. J. Lancaster and Gilbert Freeman from Lancaster, Messrs. Eugene Schick and Harold Bull from Norge Sales, and Mr. Ed Bonnet from Graybar of Los Angeles (Tr. 2388, 2983, 5370). The topic of discussion concerned the fairness and propriety of the $17.50 per appliance warranty charge that Graybar, under the Norge Consumer Protection Plan, was to pay to Lancaster if it shipped Norge products into the Lancaster distribution area (Tr. 2984, 2723, 2388-2391, 5380-5382). Since the matter was one between the respective distributors, Bull's function at the meeting was simply to get the distributors together to discuss and settle the matter between themselves (Tr. 5382). There is no evidence that Schick said or did anything at this meeting. Bull left after about ten minutes of explaining the warranty charge to the distributors (Tr. 2985, 5380). There is no evidence of any representative of Borg-Warner or Norge Sales knowing, or attempting to find out how the distributors resolved the dispute. Schick testified he thought Lancaster waived the $17.50 per appliance charge (Tr. 2984).

3. W. J. LANCASTER CO.

The principal office of Lancaster is located in San Francisco, and the company engages in the wholesale distribution of major appliances and television sets as well as other types of merchandise. At various times it has been the distributor for Motorola radios and television sets, Norge appliances, Thor washing machines, Shopsmith power tools, and Kitchen-Aid dishwashers (Tr. 2358). Of course, appellants do not contend that there was any corporate connection between Borg-Warner or Norge Sales and either Motorola, Thor, Shopsmith, Kitchen-Aid, or any other supplier of products to Lancaster.

Lancaster was not an affiliate or agent of Norge Sales. After purchasing Norge appliances from Norge Sales it sold these prod-

ucts to customers of its own choosing. At various intervals during the relevant period of time, 1957 to 1964, Lancaster had among its customers in San Francisco, Hales, Macy's, Emporium, Lachman Bros., Manfree, and the appliance concession at GET discount store (Tr. 2367-2368, 2419, 2581, 2895).[16] Also during portions of this same period, Lancaster sold Norge appliances to various discount stores throughout the San Francisco Bay Area including WASCO, a store in Daly City, and White Front Stores in Oakland and San Leandro (Tr. 2623, 2783). There is no evidence that Lancaster consulted with Norge Sales, Borg-Warner, or any other company concerning the opening or closing of any of these accounts.

Lancaster cancelled the Manfree account in September, 1957, because of what Lancaster's sales manager, Gilbert Freeman, considered to be unethical advertising practices. These practices consisted of the so-called "bait and switch" newspaper advertisements run by U.S.E. (Tr. 2585, 2594, 2866-2869, B-W. Ex. Nos. 9025, 9026). Because of this type of advertising, Gilbert Freeman gave instructions to the Lancaster salesman in the U.S.E. area, Jack Mitchell, to cancel the account (B-W Ex. No. 9027). The decision to stop selling Norge products to Manfree was wholly that of Lancaster, without any direction or suggestion from either Borg-Warner or Norge Sales or any other company or person outside of the Lancaster organization (Tr. 2877).

Lancaster reported on a monthly basis to Norge Sales the number of units sold to the various retailers in the Lancaster distribution area.[17] The report form was supplied by Norge Sales to Lancaster and the listing of retailers on the form was printed by personnel at Norge Sales from information supplied to them by Lancaster. Lancaster simply inserted numbers in the form indicating

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16. In 1957 Lancaster had approximately 140 customers in San Francisco who were reported by Lancaster to be Norge dealers. The McLab account at GET discount store bought twice as many Norge appliances from Lancaster in 1957 as did Manfree and was not cancelled by Lancaster (Pl. Ex. No. 4058Y).

17. This report was called the "Norge Distributors Monthly Dealer Purchase Report" (Pl. Ex. Nos. 4058, 4059).

how many Norge washing machines, dryers, refrigerators, or other types of appliances had been sold to each of its customer retailers during the preceding month (Tr. 2793-2798, Pl. Ex. Nos. 4058, 50A-50G).

Lancaster also periodically received from Norge Sales a "county analysis report," also called a "penetration report." This report showed the total number of various types of appliances sold in a particular county (termed "association units"), the number of Norge appliances sold in the same area for the same period of time, and the resulting percentage of Norge sales with respect to total sales in the market area (Tr. 2803-2807, Pl. Ex. Nos. 168-173). These reports showed only the Norge percentage and not that of any other company.

Lancaster, as the northern California distributor for Norge products, would from time to time receive price lists prepared by Norge Sales showing the cost to Lancaster of Norge appliances. These often contained suggested retail prices (Tr. 2830, 3010-3012, Pl. Ex. No. 1924). Often such price sheets contained no suggested retail prices for various models (Tr. 3015-3016).

Lancaster prepared its own price sheets which contained suggested retail prices. These were periodically distributed to Lancaster's retail customers. The suggested retail prices on Lancaster price sheets were sometimes the same as those suggested by Norge Sales and sometimes not (Tr. 2647, 2659, 2830-2831). The Lancaster suggested price was strictly a result of its own decision and was not controlled either directly or indirectly by either Norge Sales or Borg-Warner (Tr. 2647, 2659). There was no evidence that either Borg-Warner or Norge Sales ever demanded that Lancaster use on its price sheets the retail prices suggested by Norge Sales. Nor was there evidence that they demanded that Lancaster require retailers to use the Norge suggested prices. Nor was there any evidence that either Borg-Warner or Norge Sales made any effort to check whether or not its suggested retail prices were being employed either in advertisements or actual sales.[18]

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18. Schick, the western regional manager of Norge Sales, testified that he knew of no instance where the Lancaster suggested retail price was compared with the Norge Sales suggested retail price (Tr. 3011).

Lancaster had various advertising funds available to it which were utilized in connection with Norge products (Tr. 2672). A portion of these funds was composed of "factory money" (money contributed directly by Norge Sales) and a portion constituted Lancaster "matching funds" (see pl. Ex. Nos. 4101, and 4102). Lancaster used these funds to pay a fraction of the promotion and advertising expenses of retail dealers in connection with Norge products (Tr. 2419-2422).

It was Lancaster's policy not to allow claims by retailers against the cooperative advertising fund unless the advertisement either specified Lancaster's suggested retail price, a weekly term price, or no price at all (Tr. 2407, 2648, Pl. Ex. No. 4355). This policy was strictly the result of a Lancaster business decision. There was no rule imposed by Borg-Warner or Norge Sales that a dealer in order to qualify for cooperative advertising funds had to advertise the retail price suggested by Norge Sales (Tr. 2680). Nor was Lancaster aware that some other distributors at varying times had similar policies with respect to qualifying for cooperative advertising funds (Tr. 2407).[19]

D. Contacts and Dealings Between Borg-Warner and Norge Sales and Manufacturers or Distributors of Major Household Appliances Other Than Norge.

1. CONTACT WITH MANUFACTURERS.

Borg-Warner and Norge Sales had no arrangements or agreements with other manufacturers, either express or tacit, concerning the manner in which either of said companies, or any other company or firm in the appliance industry would conduct its business. The record is devoid of evidence of mutual understandings

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19. Graybar, the local distributor for Hotpoint appliances had such a policy in 1959 (Pl. Ex. No. 339A). It should be noted, however, that the suggested prices to be used were *Graybar's,* and not Hotpoint's. Hotpoint had discontinued the use of suggested prices by this time (Tr. 3277-3278). California Electric Supply Co. had a similar policy in 1960 (Tr. 664, 669; Pl. Ex. No. 342).

This practice was not, however, uniform among distributors. Neither Maytag West Coast or General Electric required dealers to advertise at the suggested list price in order to get co-op money (e.g. Tr. 3383-3403 [Maytag], 5225 [G.E.]). Nor did Frigidaire ever require its dealers to advertise at suggested prices (Tr. 1315-1317, 4088).

or agreements with any other manufacturer concerning the production or non-production of appliances, the quantity to be produced, the design or functional features to be included, or the method or manner of distribution either of Norge or any other brand of appliance. There was no evidence of agreement or collusion with respect to the establishment of the prices to be charged for Norge products, either to wholesalers or retailers. Nor was there any showing of joint or cooperative effort among any of the appellee manufacturers to establish uniform suggested retail prices, or to require retailers to advertise or sell at suggested prices (Tr. 901, 1183, 1604, 2228-2229, 3279, 3333, 5029). Nor was there any evidence whatever that there was ever any agreement among the manufacturer appellees or alleged co-conspirators as to how "suggested retail prices" were to be utilized[20] (Tr. 2549). There was no evidence that Borg-Warner or Norge Sales had any knowledge or interest in whether other manufacturers published suggested retail prices, or how they used them.

The record fails to show any contacts at all between Borg-Warner and Norge Sales and other manufacturers of appliances except such as were incidental to membership in either the American Home Laundry Manufacturers Association (AHLMA), or the National Electrical Manufacturers Association (NEMA)[21] (Tr. 2552-2553, 3494-3495, 5392-5394). On occasions representatives of either Borg-Warner or Norge Sales were present at some of these meetings (Tr. 2552). Obviously, representatives from

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20. Indeed, a number of manufacturers discontinued the publication of suggested list prices during the period covered by the complaints herein. Frigidaire ceased the use of suggested retail prices upon introduction of its 1961 models (Tr. 4209); by January 1959 the Hotpoint Division of General Electric had discontinued the use of suggested list prices (Tr. 3277-3278); Whirlpool stopped the use of suggested prices on its price sheets as of January 1961 (Pl. Ex. No. 1934, 1935).

21. Various of the defendant manufacturing companies at one time or another were members of either or both of these associations. For NEMA, these included Westinghouse, Whirlpool, General Electric, Borg-Warner (Tr. 5410-5411, 2552). Members of AHLMA included Westinghouse, Whirlpool, General Electric, Borg-Warner, Philco, Maytag, General Motors (Tr. 3484-3485).

other manufacturers were also present at such meetings.[22] There was no evidence presented at the trial that Borg-Warner or Norge Sales or any other manufacturer utilized these trade associations, or any committees established by such associations, or any meetings, projects, or promotions of such associations to violate the antitrust laws of the United States.

There was simply no evidence whatever of collaboration or concert of action among *any* of the manufacturers in formulating business policies, whether with respect to methods of distribution, advertising funds, prices, or otherwise. Nor was there a speck of evidence that either Borg-Warner or Norge Sales attempted or proposed to suggest to other manufacturers what they should do with regard to their policies on these same matters.

No representative of Norge Sales or Borg-Warner ever discussed the sales policies of those companies with representatives of other manufacturers. Neither U.S.E., nor Manfree, nor any other retail dealer was discussed by representatives or agents of Borg-Warner or Norge Sales with any other manufacturer. In every instance where witnesses were asked directly about conversations concerning selling or not selling to appellants it was clearly stated that no such discussions ever took place.[23]

2. CONTACTS WITH DISTRIBUTORS.

The record fails to show any contacts or dealings between Borg-Warner and Norge Sales and any *distributors* of products other than Norge brand appliances. There were simply no arrangements, agreements, understandings, or any other form of cooperative efforts or communications between Borg-Warner and

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22. The identity of the persons present at particular meetings, and the specific subject matters which were discussed at any such meetings of these associations were never established by appellants. Though certain documents were offered purporting to be minutes of meetings of NEMA, they were properly excluded for lack of foundation with respect to genuineness and authenticity.

23. See for instance: Tr. 4282-4283 (Cronin of Frigidaire); Tr. 4194-4195 (Gough of General Electric); Tr. 4396-4398 (Lau of General Electric); Tr. 4440 (Ransom of Hotpoint); Tr. 3404-3405 (Mitchel of Maytag West Coast); Tr. 4610 (Saxon of RCA); Tr. 5175 (Walker of Whirlpool).

Norge Sales and distributors of the products other than Norge. Nor did Borg-Warner or Norge Sales attempt to have such agreements or arrangements with other companies indirectly through Lancaster. When Lancaster decided to drop Manfree as a customer, that fact was not discussed or communicated, either before or after the termination, with other distributors of home appliances or anyone else (Tr. 2877, 3276, 1038, 1667-1668, 2353). Lancaster did not even discuss its decision with Borg-Warner or Norge Sales.

E. Contacts and Dealings Between Borg-Warner and Norge Sales and Retailers of Major Home Appliances and Television Sets.

The contacts and dealings between Borg-Warner and Norge Sales and the various retailers named as defendants in these cases were minimal and of no material significance. Neither Borg-Warner nor Norge Sales had any direct interest in retailer activities, since Norge Sales chose to sell only to independent distributors. In the San Francisco Bay Area it was Lancaster's business to establish retail outlets for Norge products. Lancaster purchased the Norge appliances outright from Norge Sales. It did not handle these products on a consignment basis or as a sales agent for either Norge Sales or Borg-Warner. The retail stores in San Francisco were the customers of Lancaster, not the customers of Norge Sales or Borg-Warner (Tr. 538, 694, 6041-6043). Any contact between representatives of Borg-Warner or Norge Sales and the retailers was either purely coincidental, or merely for purposes of establishing goodwill in connection with the Norge trademark.

The record is barren of evidence showing any meetings or conversations or any other form of contact between representatives of Borg-Warner and Norge Sales on the one hand and representatives of either Lachman Bros., Sterling Furniture Company, or Redlicks on the other. While Macy's was shown to be a key account of the Lancaster company (Tr. 2685), there is no evidence whatever of any contact between Macy's representatives and Borg-Warner or Norge Sales. Hale was also a key account of Lancaster during part of the period 1957-1964 (Tr. 2419, 2765). It is clear

that any dealings Hale had with respect to the purchase of Norge appliances were with Lancaster, and not with Borg-Warner or Norge Sales (Tr. 549, 2433). Sanford, General Manager of the Appliance Division of Hale between March 1957 and July 1959 (Tr. 505), could not recall meeting or even hearing of Gene Schick who was the western regional manager of Norge Sales during the latter portion of this same period of time (Tr. 542-543).

Appellants were only able to show several meaningless encounters between persons employed by Norge Sales and Hale. One was a meeting between Judson Sayre (the president of Norge Sales) and Richard Sanford of Hale in 1959. This meeting took place during the January Market in Chicago. Such "markets" are annual events at which representatives from distributors and retailers throughout the country visit the Merchandise Mart in Chicago to view the new products being offered for sale by the various manufacturers. Because Sanford had known Sayre for many years in connection with the appliance business, Sanford during his visit to Chicago called on Sayre to say "hello" and chat with him. No business matters were discussed at this meeting (Tr. 527-537).

A similar meeting occurred between Roy Hurd of Hale and Harold Bull of Norge Sales sometime between 1955 and 1960. There is no evidence of there being any conversation between these gentlemen other than being introduced to each other at a trade show (Tr. 5386-5388).

A third instance of a meeting involving Norge Sales and Hale personnel was that of Gene Schick meeting Mr. Paul Thomas at a new line showing. Schick could not recall the time or place of this meeting (Tr. 2962-2963). The evidence developed nothing beyond these simple and meaningless facts.

It was the practice of Norge Sales and other companies to host cocktail parties at the time of the January trade shows in Chicago. Norge Sales invited distributors of Norge products throughout the country to its party and distributors could in turn invite some of their customers (Pl. Ex. No. 4096B, Pl. Ex. for Id. No. 4092). Sanford recalled that there were hundreds of people at such

parties; that he received many invitations to such parties; and did in fact attend some, although he could not specifically recall attending a Norge cocktail party (Tr. 545-547).

In summary, the few contacts and dealings by either Borg-Warner or Norge Sales with other companies whether manufacturers, distributors or retailers were entirely lawful, and devoid of antitrust significance.

F. Contacts and Dealings Between Borg-Warner and Norge Sales and Appellants.

Neither Borg-Warner nor Norge Sales had any business dealings with appellants. What little communication there was between appellants and Borg-Warner or Norge Sales was generated by appellants on the eve of this lawsuit and after its commencement (Pl. Ex. Nos. 4286, 4038, 1773).

Bernard Freeman, an officer of both USE and Manfree, testified to the steps which Manfree took in 1957 to become a retail dealer of Norge appliances. First the good credit of Manfree was established with Lancaster, then orders for Norge Brand products were submitted to Lancaster. Payment for all Norge appliances ordered by Manfree was made to Lancaster (Tr. 6041-6044). Freeman also requested advertising funds for Norge products from the Lancaster salesmen (Tr. 5807). In short, all of the transactions of Manfree in connection with Norge appliances were with the local independent distributor for Norge products, Lancaster and there were no dealings or communications between Manfree and either Borg-Warner or Norge Sales.

When Lancaster, for good reasons of its own, chose to drop Manfree as a customer in 1957, attorneys then representing appellants sent a letter to Lancaster requesting an explanation of the cancellation (Tr. 2383). No similar letter or other communication was addressed to Borg-Warner or Norge Sales by appellants.

The only contacts which Borg-Warner and Norge Sales have ever had with either of the appellants came through a series of three "demand" letters addressed to them from Manfree in the years 1960, 1961 and 1963 (Tr. 5950-5955, Pl. Ex. Nos. 4286, 4038, 1773). Norge Sales replied to each of these letters (Pl. Ex.

Nos. 1772, 1771, 1775). Aside from these form letters,[24] appellants had no other dealings or communications with Borg-Warner or Norge Sales whatever; nor was there any showing of attempts made by appellants to have further dealings, discussions, or negotiations with either of said companies.

The replies of Norge Sales[25] to each of appellants' three letters advised them that Norge products were sold to retailers through independent distributors, and that the distributor in appellants' area was Lancaster. Lancaster was notified of appellants' requests for Norge products directly by Norge Sales (Pl. Ex. Nos. 1772, 1771). The first of these demand letters was referred to Lancaster by Norge Sales with the request that Lancaster contact Manfree "if the request is in order" (Pl. Ex. No. 556). Norge sales did not make any investigation or inquiry as to what Lancaster had done with respect to the Manfree request (Tr. 2883).

IV.

ARGUMENT

A. The Trial Court Correctly Granted a Directed Verdict in Favor of Appellee Borg-Warner Corporation.

1. THE GENERAL PRINCIPLES GOVERNING DIRECTED VERDICTS WERE PROPERLY APPLIED BY THE TRIAL COURT.

At the conclusion of plaintiffs' case all of the defendants, including appellee Borg-Warner, moved the court for a directed verdict and dismissal of the complaint (Tr. 6609; R. 1794).

The standard for determining whether or not a directed verdict

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24. The 1960 "demand" letter (Pl. Ex. No. 4286) is the same as that sent to numerous other appellees and alleged co-conspirators. For example, Pl. Ex. Nos. 492, 4280, 4284. The 1961 "demand" letter to Borg-Warner (Pl. Ex. No. 4038) is the same as letters addressed to other appellees and alleged co-conspirators bearing Exhibit Nos. 496, 4271, 4282. The 1963 "demand" letter to Norge Sales (Pl. Ex. for Id. No. 1773) was stipulated to be the same in content as Pl. Ex. No. 1722 which was conceded to be a form letter sent to various of the appellees and alleged co-conspirators (Tr. 5932).

25. The first two replies were written by J. D. Dougherty, the General Sales Manager of Norge Sales; the third reply was written by attorneys for Norge Sales, the third "demand" letter having been sent out by appellants more than three years after the commencement of the present litigation.

should be granted is basically this: where both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion, then the court should grant a directed verdict in favor of that party. This circuit has applied the rule of *Brady v. Southern Railway Company,* 320 U.S. 476, 479 (1943) with respect to the manner in which the evidence is to be viewed on an appeal from a directed verdict. Thus, in *Shafer v. Mountain States Telephone & Telegraph Co.,* 335 F.2d 932 (9th Cir. 1964), the court said as follows:

> "This court has recognized the rule that '(U)pon appeal from a judgment of dismissal entered upon the close of a plaintiff's case-in-chief, the appellant is entitled to the benefit of every inference which can reasonably be drawn from the evidence viewed in the light most favorable to the claim or cause of action asserted.' *Kingston v. McGrath,* 9 Cir. 1956, 232 F.2d 495, 497, 54 A.L.R.2d 267. On the other hand, *'(W)hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury,* or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims' Brady v. Southern Ry. Co., 1943, 320 U.S. 476, 479, 64 S.Ct. 232, 235, 88 L.Ed. 239." (Emphasis added)[26]

The trial court correctly determined that the evidence and *logical* inferences therefrom, viewed most favorably with respect to appellants, would not support a finding that any of the appellees were guilty of conspiring to restrain or monopolize interstate trade in major home appliances or television sets. In so doing it properly looked to all the proven facts and circumstances surrounding appellees' dealings, or lack of dealings, with appellants, with other alleged co-conspirators, and with each other.

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26. All emphasis hereinafter appearing in this brief is that of the present writer unless otherwise specified.

In this respect, the statement of the Court in *Pevely Dairy Co. v. United States,* 178 F.2d 363 (8th Cir. 1949) is pertinent. That case involved a criminal prosecution under the antitrust laws for price fixing. In reversing a conviction the appellate court said with respect to the evidence in the case:

> "This testimony, we think forms no basis for a legitimate inference of the making of or participation in any sort of a conspiracy for the fixing of prices. Inferences which are contrary to established facts may not be drawn from mere conjecture and an unwillingness to believe the unimpeached and uncontradicted testimony of witnesses. Inferences are not themselves evidence but are the result of evidence and are based upon circumstances to take the place of actual proof. When, however, substantial proof is made contrary to the fact inferred, the inference is completely refuted."

This Circuit follows the same rule. Thus in *Independent Iron Works, Inc. v. United States Steel Corp.,* 322 F.2d 656 (9th Cir.), *Cert. Denied* 375 U.S. 922 (1963), this court, in upholding a directed verdict for defendants, said of the evidence (pp. 661-662):

> "The inference of conspiracy, based upon the defendants' approximately simultaneous change in their manner of dealing with plaintiff, might have been permissible in the absence of evidence showing that their respective actions were prompted by some fact other than mutual understanding or agreement. However, here it appears beyond question that outside factors dictated the change.
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> ". . . In this mileu we see no justification for an inference of any Sherman Act violation from the fact that all the defendants changed their mode of distribution at about the same time."

Had the matter been allowed to go to the jury in *Independent Iron Works,* the jury might have arbitarily rejected the explanation of the defendants. Despite the proven facts of shortage of steel and increased demands, the jury might have sided with plaintiff's bald assertion that the change in the mode of distribution of defendants was pursuant to illegal agreement. But, the trial court recognized, and so did this court, that any such conclusion would not have been one reasonably drawn from the proven

facts, and therefore, that a directed verdict was called for. The same situation is presented in the present case.

2. APPELLANTS FAILED TO PRESENT ANY COMPETENT EVIDENCE OF CONSPIRACY INVOLVING BORG-WARNER, OR NORGE SALES, OR ANY OTHER APPELLEE.

a) No Inference of Conspiracy to Boycott Appellants Arises Because of Lancaster's Termination of the Manfree Account, or Because Borg-Warner and Norge Sales Refused to Sell Directly to Manfree.

In order for appellants' case on liability to go to the jury with respect to *any* of the appellees, appellants must have presented sufficient evidence to support a finding 1) that a conspiracy to restrain or monopolize interstate trade existed between an appellee and at least one other appellee or alleged co-conspirator and, 2) that an overt act was committed pursuant to such conspiracy which was the cause of injury to appellants. *Flintkote Company v. Lysfjord*, 246 F.2d 368, 374 (9th Cir. 1957). Beyond this, however, for appellants' case to go to the jury with respect to Borg-Warner, (Norge Sales was already dismissed pursuant to Summary Judgment) there must have been evidence that Borg-Warner knowingly participated in any such alleged conspiracy. *United States v. Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963); *Standard Oil Company of California v. Moore*, 251 F.2d 188, 211-212 (9th Cir. 1957).

Appellants failed to present evidence of any conspiracy between or involving any of the appellees. Of course, there was no direct evidence of any conspiracy or agreement to boycott either U.S.E. or Manfree. Appellants' assertion that there was direct evidence of a boycott against them (Br. p. 86) is not borne out by the record, or even by appellants' arguments. (See Br. pp. 78-80, summarizing the evidence which appellants claim constitutes the evidence that a conspiratorial boycott existed.)

For proof of the alleged conspiracy and concerted refusal to deal appellants rely upon *circumstantial* evidence. It is, of course, conceded that there need be no express agreement to constitute an unlawful combination or conspiracy, and that an antitrust violation may be found in a course of dealings or other circumstances. *American Tobacco Co. v. United States,* 328 U.S. 781 (1946);

Standard Oil Company of California v. Moore, supra. However, appellants proved no such course of dealings or circumstances.

As one piece of circumstantial evidence, appellants rely heavily upon the fact that suppliers of various brands of major home appliances and television sets, including those manufactured by the the manufacturer appellees herein, "refused to deal with Manfree" (Br. pp. 41-52, 54-62). This type of evidence must be analyzed in the light of *Theatre Enterprises v. Paramount Film Distributing Corporation,* 346 U.S. 537, 541 (1953), where the Court held:

> "[T]his court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

The business behavior which appellants characterize as "refusals to deal" encompasses a wide variety of action or inaction by appellees and alleged co-conspirators. Some companies sold merchandise to Manfree at different periods of time; some never sold to Manfree but sent representatives to visit the premises of U.S.E. and thereafter decided not to have Manfree as a customer; some, including Borg-Warner and Norge Sales, never sold products to Manfree or even visited U.S.E. for the reason that they didn't sell to any retailers. The "refusals" relied on by appellants thus not only fall short of being similar business behavior, they are in many instances positively dissimilar behavior.

In *Milgram v. Loew's,* 192 F.2d 579 (3rd Cir. 1951), a case dealing with inferences of consiparcy from uniformity of action by the defendants, the trial court found that the uniform refusal of eight distributors to license first-run films to plaintiff was the result of concerted action. The appellate court in upholding this finding said at page 583:

> ". . . This uniformity in policy forms the basis of an inference of joint action. This does not mean, however, that

> in every case mere consciously parallel business practices are sufficient evidence, in themselves, from which a court may infer concerted action. Here we add that each distributor refuses to license features on a first-run to a drive-in even if a higher rental is offered. *Each distributor has thus acted in apparent contradiction to its own self interest. This strengthens considerably the inference of conspiracy*, for the conduct of the distributors is, in the absence of a valid explanation, inconsistent with decisions independently arrived at."

Contrast the present case, where the plus factor of "activity against self interest" is totally lacking. Indeed, the "market context" shown by the evidence here strongly suggests that Manfree was not a desirable retail outlet for major appliances. Manfree was a small concession in a "warehouse" type of building on the outer fringes of San Francisco; its salesmen were not specifically trained or motivated to sell any particular brand (Tr. 5639-5640); it was a new and untried company whose predecessor as the major appliance concession at U.S.E. had gone out of business after financial difficulty (Tr. 5712); its sales performance with various brands of major appliances was not noticeably successful (Manfree sold only 51 Norge appliances during the five month period May to October 1957[27] (Pl. Ex. No. 50-B); and its potential customers were limited to persons possessing a U.S.E. membership card until October 1961 (Tr. 5999-6000).

The trial court, in holding that the various reactions and responses of appellees and alleged co-conspirators to the demands of Manfree did not rise to the level of creating a logical inference of joint or concerted action, correctly applied the test recognized and applied by this court in *Flintkote Company v. Lysfjord, supra,* p. 377:

> "The decisions have placed and evaluated refusals to deal in the business setting in which they appear. While refusals to deal in themselves are legally protected, they are examined in their context."

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27. By contrast, Macy's of San Francisco had sold 288 Norge appliances during the period January to October, 1957 (Pl. Ex. No. 4058Q).

Here the market context proved beyond all doubt that the refusals of Norge Sales and Borg-Warner to sell appliances directly to Manfree were because these appellees had an established policy of not selling to any retailers. There is no similarity whatever between the facts of the present case and *Flintkote,* where the evidence clearly showed a conspiracy among acoustical tile dealers of which Flintkote had knowledge, coupled with threats of these dealers to refuse to buy from Flintkote if it continued to sell to plaintiffs.

The trial court also correctly applied the standard enunciated in *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 746-747 (N.D. Cal. 1959), *aff'd* 322 F.2d 656 (9th Cir.), *cert. denied* 375 U.S. 922 (1963).

> "There must be more than mere general similarities; there must be a sameness of conduct under circumstances which logically suggest joint agreement, as distinguished from individual action. Proof of parallel business conduct is not a substitute for proof of conspiracy, and similar conduct, as such, does not establish conspiracy. . . . The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy."

In the present case there was no "sameness of conduct" so far as the actions of appellees and alleged co-conspirators toward appellants. It is true that certain distributors in the San Francisco area at one time or another chose not to continue Manfree as a customer; and that certain other distributors and manufacturers never supplied Manfree major home appliances or television sets. To say, as appellants do, that this is sufficient evidence for the trier of fact to find a conspiracy, agreement, or concert of action, is to ignore all the specific and detailed variations in appellees' dealings or contacts with appellants. Neither in time, nor in activity, nor in reasons for appellees' business behavior toward Manfree was there parallelism, much less uniformity. Further, there is no evidence that the action of any appellee with respect to Manfree or U.S.E. was done with consciousness of how others were dealing with appellants.

Thus, Lancaster, the local distributor of Norge products, sold the Norge brand major household appliances to Manfree during the period May-October, 1957. Its cancellation of Manfree as a customer came because of what Lancaster considered to be "unethical" advertising practices (Tr. 2594, 2867, 2874A-2877, B-W Ex. 9027). The record is absolutely devoid of any evidence that this action by Lancaster was at the request, suggestion, or demand of either Borg-Warner or Norge Sales. In fact, the only evidence on this point is directly to the contrary (Tr. 2877). No other distributor was shown to have cancelled Manfree at this same time. No other company cancelled Manfree because of its use of bait and switch advertising. No other company, *including Borg-Warner and Norge Sales,* was notified of Lancaster's action with respect to Manfree either before or at the time of the cancellation.[28] Though Norge Sales was *later* notified of the cancellation, there is no evidence that any other company became aware of it.

As to the distributors who dealt with Manfree at some period of time there was no uniformity or similarity in conduct or attitude toward Manfree. The mere fact that at different times each of these distributors independently and for separate and distinct reasons of its own decided not to continue the Manfree account, when viewed in the light of other established facts and the "market context" does not suggest any concert of action. (See Tr. 3269-3271, 3375-3379, 3691-3693.)

No inference may be drawn that Borg-Warner or Norge Sales was a member of any alleged conspiracy to boycott appellants simply because Lancaster cancelled the Manfree account in September of 1957. Manfree was one of at least 140 San Francisco dealers of Lancaster who carried Norge products in 1957 (Pl. Ex. No. 4058X,

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28. The "Norge Distributors Monthly Dealer Purchase Report" was used by Lancaster to notify Norge Sales of cancellation of retailer accounts (Pl. Ex. No. 4058). This record shows that Lancaster didn't report the termination of the Manfree account until April 1958 (Pl. Ex. No. 4058AI). Until then, Norge Sales continued to list Manfree as a Lancaster customer. This is striking evidence that Norge Sales did not keep track of its distributors' actions with respect to retailers. Norge Sales had no information that Manfree was no longer a customer of Lancaster's until that fact was reported to it by Lancaster *six months* later.

Y, Z). Bernard Freeman, president of Manfree, testified that Noriega Hardware, K. C. Richards, House of Karlson, Balboa Furniture, Barnell Company, and Charon, [sic] among others, were stores in San Francisco selling major household appliances and television sets at discount prices. That is, selling at less than "list prices" (Tr. 6005-6006). *All of these accounts were customers of Lancaster, selling Norge appliances in 1957 and 1958* (Pl. Ex. Nos. 4058 X, Y, Z, AJ, AK, 4059).

Lancaster during 1957 cancelled at least seventeen customers in San Francisco, not including Manfree. *Not one of these cancellations was of the above named companies that appellants admitted were "list price" cutters* (Pl. Ex. No. 4058 X, Y, Z).

Young Bros. presents a similar picture—a San Francisco appliance store which sold major household appliances at discount prices, ("Substantially below suggested retail prices" according to appellants' witness Marvin Boyd (Tr. 5648)). Yet Lancaster sold this company 487 Norge appliances in 1957, and 429 Norge appliances in 1958 (Pl. Ex. Nos. 4058Z, 4059AP).

G.E.T. was identified as a "discount department store" in San Francisco—similar to U.S.E. The appliance concession for that store was called McLab (Tr. 2895, 3054). The evidence shows Lancaster sold large quantities of Norge appliances to this store in 1957 and 1958 (Pl. Ex. Nos. 4058Y, AK).[29]

The dissimilarity between the facts presented by appellants with respect to Borg-Warner and Norge Sales in the present litigation and those presented in *Standard Oil Company of California v. Moore, supra,* is at once apparent. *First,* the activities by the oil dealers with Moore were inconsistent. That is, one time representatives of a defendant company would say they were ready and willing to deal with Moore then later they would refuse. In the present case, Borg-Warner and Norge Sales never dealt with retailers, and Manfree was consistently referred to the

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29. Indeed, while Manfree bought only 51 Norge appliances in 1957 (Pl. Ex. No. 50-B), McLab bought 167 Norge appliances in 1957 and 102 in 1958 (Pl. Ex. Nos. 4058Y, 4059AP). The supposed "list price maintenance" conspiracy conjectured by appellants is utterly discredited by this uncontradicted evidence.

local distributor, Lancaster. *Second,* the companies that refused to deal with Moore were all in a position to serve him without any change in their manner of gasoline distribution—all sold directly to dealers. In the present case neither Borg-Warner nor Norge Sales sold to retailers. It would have constituted an entire alteration in the distribution policies of Norge Sales to sell directly to Manfree. *Third,* the refusals to deal with Moore came within a very limited period of time—mainly within a matter of days after Tide Water ceased supplying Moore. In the present case some alleged conspirators were selling to Manfree more than a year after Lancaster terminated that account. *Fourth,* there was evidence in *Moore* that Tide Water made direct objections about the prices that Moore was charging, and also that Tide Water demanded that curb signs advertising the objectionably low prices be removed. Here there was no evidence that Borg-Warner or Norge Sales, or any other supplier, whether manufacturer or distributor, ever tried to control Manfree's selling prices, or even knew what they were.[30] In fact, there is no evidence that Manfree actually sold Norge appliances for less than such appliances were sold by other retailers such as Hale. (Hale sold appliances at discount prices (Tr. 5646)). *Fifth,* in *Moore* there was evidence that a Tide Water representative had said, "If you don't take the price sign down, when I get through with you no company in town will sell you gas." The court properly held that there was an inference that could be drawn from this that Tide Water felt assured its pressure on Moore would be supported by the other gasoline suppliers. No such evidence or anything analagous thereto was presented in this case. *Sixth,* other aggressive price cutters in *Moore* had difficulty obtaining gas. Here the evidence shows that Lancaster sold Norge appliances to other discount stores including White Front, G.E.T. and WASCO (Tr. 2623, 2783, 2895). *Seventh,* Moore showed a series of specific contacts and communications between the defendants involving various phases of business policy—including concurrent and uniform discontinuation

30. Appellants stipulated there was no correspondence between either U.S.E. or Manfree and Borg-Warner (Tr. 6185). There was no evidence of any oral communications between appellants and representatives of either Borg-Warner or Norge Sales.

of split-pump accounts; posting of tank wagon prices; uniform practice of allowing unpublished discounts; a practice of all oil companies of exchanging petroleum products with each other to meet special supply or storage problems; and the practice of getting "clearances" before taking on dealers already in business. None of these miscellaneous practices, or anything similar thereto, was shown by the evidence in the present case to be practiced by Borg-Warner or Norge Sales.[31]

As to the manufacturing appellees, the evidence shows that three of them (Borg-Warner, Whirlpool Corporation, and R.C.A.) never sold their products directly to any retailers in northern California (Pl. Ex. Nos. 95, 101, 46). Borg-Warner, at all times material herein, did not even sell to local distributors. It simply manufactured Norge brand home appliances in the division of Borg-Warner designated "Norge Division" and sold its entire output to Norge Sales (Pl. Ex. Nos. 1771, 1775). Norge Sales in turn marketed Norge brand products throughout the country to independent distributors (Tr. 2364, 2389, 2916, Pl. Ex. No. 1771). While the Distribution Agreements between Norge Sales and Lancaster for 1959 and 1960 (Pl. Ex. Nos. 46, 47) provide that "Norge may without restriction and without notice or compensation to the distributor appoint direct dealer outlets", the evidence fails to show that Norge Sales ever appointed any such direct dealer outlets or sold any of its products to retail dealers in California pursuant to this clause.

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31. In a vain attempt to show a factual similarity to *Moore,* appellants rely in part upon "accommodation transfers" which were sometimes made between one retailer and another (Tr. 1308-1311, 1600). There is no similarity between this and the exchange of petroleum products in *Moore.* There was no uniform or regular practice shown of making such accommodation transfers by manufacturers or at manufacturers' requests. Further, none of the present appellees were shown to be involved with, or have knowledge of such practices. Likewise, appellants' attempt to compare the "clearance" in *Moore* with new customer credit checks is without validity (Br., p. 107). Lancaster was not shown to "clear" with other distributors such as California Electric or Graybar before taking on new retailer customers as Norge dealers.

Appellants base their charge of conspiratorial refusal to deal by Borg-Warner and Norge Sales in part upon replies to three "demand letters" of Manfree (Br., pp. 54-55, 74-76). The first of these demands was addressed to "National Sales Manager, Norge Home Appliances" and was dated June 24, 1960 (Pl. Ex. No. 4286). This letter was answered by Norge Sales and referred Manfree to the distributor in the San Francisco area, Lancaster (Pl. Ex. No. 1772). But Norge Sales did more than this. The sales manager sent a letter to Lancaster's vice-president, Gilbert Freeman, asking him to contact Manfree "if the request is in order" (Pl. Ex. No. 556). This document indicates a total lack of knowledge or information about Manfree so far as the sales manager of Norge Sales was concerned. Of course, this letter demand, Pl. Ex. No. 1772, was received by Norge Sales before the present litigation was commenced.[32]

The second demand was addressed to "Borg-Warner Corporation" dated September 25, 1961 (Pl. Ex. No. 4038). This letter was likewise answered by Norge Sales, and the request was again referred to Lancaster. By this time both Borg-Warner and Lancaster were defendants in appellants' first action. There is no evidence that Borg-Warner or Norge Sales gave any instructions to Lancaster as to how to handle this request. This was just good business on the part of both Borg-Warner and Norge Sales. It was not their practice to meddle or interfere with the business decisions of the local distributors of Norge products. So long as Lancaster was maintaining a good record of sales of Norge products throughout its distribution area it was of no interest to Borg-Warner or Norge Sales who Lancaster's customers were (See Pl. Ex. Nos. 46, 47, 48). Obviously, neither of these com-

32. It should be noted that Lancaster received a similar letter from Manfree (Pl. Ex. No. 4284). It is not surprising that it did not bother to answer the request as Lancaster must obviously have known that the request was not made in good faith. Thus, the Manfree letter says that "we will be ordering in carload lots." Yet in the *five months* that Manfree was a customer of Lancaster, Manfree never ordered a carload of Norge appliances. In fact, the *total* number of appliances ordered by Manfree in that time did not amount to a carload (Pl. Ex. No. 50-B).

panies was in a position to evaluate the thousands of retail dealers throughout the country.[33]

The third demand was addressed to "Norge Sales Corporation" dated November 20, 1963 (Pl. Ex. No. 1773). This letter was answered by attorneys for Borg-Warner (Pl. Ex. No. 1775, Tr. 5953-5955) and again appellants were advised to contact Lancaster inasmuch as Norge Sales did not sell to retailers. Thus it was made abundantly clear to appellants at all times that Norge Sales sold only to Lancaster in northern California as an independent distributor of Norge products (Pl. Ex. Nos. 1772, 1771, 1775). There is no suggestion by appellants, and there could be none, that Norge Sales adopted this manner of distribution only with respect to, or because of, Manfree. Thus, the far-fetched proposition of appellants that the reason that Norge Sales refused to sell Norge products to Manfree was because Manfree was a "discount" operation simply does not stand up in light of the proven facts. A jury could not be allowed to draw such an inference in the face of the evidence. *Independent Iron Works, Inc. v. United States Steel Corp., supra.*

No requirement in the antitrust law compels a manufacturer to sell to a retailer just because a demand for its product has been made by the retailer. In the absence of any purpose to create or maintain a monopoly or illegal agreement, the Sherman Act does not restrict the right of a manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal. *United States v. Colgate & Co.,* 250 U.S. 300 (1919). Borg-Warner and Norge Sales had the right, absent unlawful conspiracy, to sell or refuse to sell Manfree, or any other potential customer, for any good cause, or for no cause whatever. *Johnson v. J. H. Yost Lumber*

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33. Pl. Ex. Nos. 4058 and 4059 give some idea of the number of retail dealers across the country that were involved in the sale of Norge products. These exhibits show approximately 140 Norge dealers in San Francisco alone. Neither Borg-Warner or Norge Sales could, or tried to, select the retail outlets that would best promote sales of Norge appliances. It was the business policy of Norge Sales to franchise independent distributors throughout the country who in turn were in a position to select their own customers based upon their knowledge of the local markets.

Co., 117 F.2d 53, 61 (8th Cir. 1941); *Flintkote Company v. Lysfjord, supra.*

As this court observed in *Standard Oil Company of California v. Moore, supra,* the act of an individual company in refusing to deal with another usually does not, standing alone, have antitrust significance. Certainly if this is true with an ordinary choice of customers, that is, choosing one retailer rather than another, it is obviously so where the party asked to deal has made a policy of not dealing with *any* retailers. This is the situation with Borg-Warner and Norge Sales. A manufacturer is not compelled to sell to everyone who wants to buy his product. Were the rule otherwise, exclusive dealerships would not be possible. Courts have consistently recognized the legality of this manner of selecting customers. *United States v. Arnold Schwinn & Co.,* 388 U.S. 365 (1967); *Schwing Motor Company v. Hudson Sales Corp.* 138 F.Supp. 899 (D. Md.), *aff'd per curiam,* 239 F.2d 176 (2d Cir. 1956), *cert. denied,* 355 U.S. 823 (1957).

The evidence clearly shows that Norge Sales had a policy in effect, even prior to the existence of U.S.E. or Manfree, of selling its products only to independent distributors.[34] There is not a single instance presented by the evidence in which Norge Sales deviated from this policy. Therefore, no logical or reasonable inference of conspiracy to restrain or monopolize trade can be drawn from the refusal of Norge Sales to change this policy.

It is further clear that a manufacturer who deals through an independent distributor has the right to refuse to try to influence or change the policies of that independent distributor in regard to his manner of selecting customers. Thus, in *Brosious v. Pepsi-Cola Co.,* 155 F.2d 99 (3rd Cir. 1946) the court granted a dismissal of a treble damage antitrust action at the close of plaintiff's case holding that there was no inference of conspiracy because of a manufacturer's refusal to interfere with the policies of its distributor. The evidence showed that Pepsi-Cola had a contract with Cloverdale Spring Company by which the latter was appointed exclusive bottler for Pepsi-Cola. The agreement was in

34. Lancaster became a distributor of Norge products in 1955, U.S.E. opened for business in 1957 (Tr. 2358, 5707).

effect a distributorship agreement and Cloverdale for a number of years sold to the plaintiff, Brosious. Cloverdale cancelled the Brosious account when Brosious refused to comply with a demand by Cloverdale that Brosious take on more territory, paint its trucks the prescribed color, and distribute only the products of Cloverdale. Brosious took his objections to the offices of the Pepsi-Cola Company. He was informed that it was not the policy of the Pepsi-Cola Company to tell their "franchise bottlers" what to do, but that when sales drop off in any particular territory it "steps in" and that it follows the policy of backing up its franchise bottlers and would do so in this case. From this Brosious tried to draw an inference of conspiracy to monopolize the wholesale distribution of Pepsi-Cola. The court at page 102 said:

> "It is the right, long recognized, of a trader engaged in a strictly private business, freely to exercise his own independent discretion as to the parties with whom he will deal. [citing cases]
>
> "We conclude that the contract between the appellee corporations, independent of the interstate commerce, was not of itself offensive to the monopoly phase of the Sherman Act.
>
> "Brosious upon meeting with the situation described, appealed to officers of Pepsi-Cola Company, and he contends that the treatment accorded him, together with the contract and the refusal of Cloverdale to sell to him, proves the conspiracy alleged.
>
> "*We are unable to make anything more out of the interviews with Pepsi-Cola officials other than that they do not interest themselves with distributor's business* so long as he adheres to the contract and the volume of business is regarded by them as satisfactory. Such a policy is not unusual and is simply good business in a competitive economy. See *Arkadelphia Milling Co. v. St. Louis S.W.R. Co.,* 1919, 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517. We are entirely in accord with the trial judge in saying 'It is my opinion that the evidence will not support a finding, that a conspiracy existed between the Cloverdale Spring Co. and Pepsi-Cola Company pursuant to which sales of Pepsi-Cola to the plaintiff were discontinued.', and we repeat that there is no evidence in the record of any monopolistic practice or unreasonable restraint of trade, interstate or intrastate, in the operation of the two corporations under the contract."

The relationship between Norge Sales and Lancaster, and the response that Norge Sales made to Manfree demands are analogous to the relationship between Pepsi-Cola Company and Cloverdale, and the response of Cloverdale to Brosious demands. The trial court was correct in ruling that no inference could be drawn from the fact that Norge Sales made no effort to interfere with Lancaster's decision not to have Manfree as a dealer, either by trying to compel Lancaster to sell Manfree, or by shortcutting the normal distribution pattern and selling Manfree directly.

b) The Evidence of Supposed Hale Pressure on Lancaster Was Not Admissible Evidence Against Any of the Appellees, and Even if Admitted Would Prove Nothing as to Said Appellees' Knowledge or Participation in the Alleged Conspiracy.

i. Statement attributed to John L. Mitchell of Lancaster.

One of the points relied on by appellants for reversal of the directed verdict in favor of Borg-Warner is the testimony of Bernard Freeman, the president of Manfree, concerning a conversation he purportedly had with John L. Mitchell of Lancaster in September or October of 1957 (Br. pp. 43, 89). Mitchell at the time of this alleged conversation was a salesman for Lancaster in the territory where U.S.E. is located.

Mr. Freeman testified that Mitchell had told him that Lancaster had had "pressure" from Hale not to sell to U.S.E., and that if Lancaster sold to U.S.E., Hale would not buy from Lancaster; and that the Lancaster organization held a meeting and decided not to sell to U.S.E. any longer (Tr. 5808-5809).

Mitchell was not called as a witness by appellants, nor was any portion of his deposition read into evidence, appellants relying solely on the hearsay testimony of their own chief officer, Bernard Freeman.

Upon an objection on the grounds of hearsay being interposed the Court ruled:

> "Well, at this time the jury will have to await my further instructions as to whom this conversation shall apply to—which defendant, if any." (Tr. 5809)

In its memorandum opinion and order granting motions for directed verdict, the trial court ruled as follows:

> "This hearsay declaration cannot be admitted in evidence against Norge Sales, absent either prima facie evidence of a conspiracy or prima facie evidence of Norge Sales' participation therein. Neither of these two prerequisites for the admission of this hearsay statement against Norge Sales has been established, nor can it be said that there is sufficient evidence from which the same could be reasonably or fairly inferred." (R. 1963)

The court also ruled in its memorandum opinion that this hearsay statement was not admissible against the defendant Hale for the reason that there had been no independent evidence establishing the participation in any conspiracy on the part of Hale. The court noted that "Such conversation is self-serving hearsay, conclusionary in nature, and it would be error to admit as to Hale, as there is no exception to the hearsay rule which applies to Hale." (R. 1972)

In making the rulings that it did in regard to the alleged statement of Mitchell, the trial court correctly applied well established rules governing the admissibility of hearsay evidence. This Court in *Flintkote Company v. Lysfjord, supra,* pp. 379-380, said with respect to the same kind of evidence:

> "The only evidence that plaintiffs offered to prove defendant's 'yielding' and the joining by Flintkote of the conspiracy, other than the act itself of refusing to sell, was the respective testimony of Waldron and Lysfjord relating to (a) alleged admissions of Baymiller; and (b) alleged admissions of Ragland; and (c) the testimony of Lysfjord with respect to a telephone conversation directly with Krause."

A review of this testimony in *Flintkote* shows that the hearsay conversations there testified to by Waldron and Lysfjord, the plaintiffs, were similar in import to the statement herein attributed to Mitchell.[35] The positions of Mitchell in the present case

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35. The report of the *Flintkote* decision quotes the testimony with respect to these conversations in footnotes 6, 7, 8, 9 and 10 at pp. 380 and 381. These generally related to statements made to the witnesses concerning pressure being applied to Flintkote by some of its dealers to stop dealing with plaintiffs.

and Krause in *Flintkote* are comparable in that Mitchell was an employee of Lancaster, one of the dismissed defendants at the time of trial. But, whereas Krause was an alleged officer and managing director of his company, Mitchell was shown to be only a salesman for Lancaster (Tr. 2594); also, Krause was named individually as a co-conspirator, Mitchell was not. With respect to the statement that Krause purportedly made to Lysfjord this court said at page 386:

> "Conversation Number 3 involves no question of agency, for Krause was neither agent, servant nor employee of the defendant Flintkote. Krause was named as a co-conspirator in the amended complaint. Thus, if plaintiff had made a prima facie showing that there was a conspiracy and that Flintkote had joined the conspiracy, then the statements made by a co-conspirator, if made *during the existence of the conspiracy, and in execution of the common design,* were admissible against all conspirators. Schine Chain Theatres v. United States, 334 U.S. 110, 117, 68 S.Ct. 947, 92 L.Ed. 1245; United States v. United States Gypsum Co., 333 U.S. 364, 393, 68 S.Ct. 525, 92 L.Ed. 746. [Emphasis the Court's]
>
> "This conversation was introduced for the purpose of establishing that the act of termination was not equivocal, that it was an act in furtherance of the conspiracy, and that Flintkote had joined in that conspiracy. Excluding the evidence improperly introduced, no sufficient basis for the introduction of Conversation Number 3 was proved. Thus the foundation required to make the evidence admissible could only be established by the evidence itself. While much latitude is allowed in the order of proof establishing a conspiracy (as we have hereinabove discussed) the proponent of the evidence must still lay a proper foundation."

In the present case there is no independent proof of conspiracy apart from the inadmissible hearsay declarations of the alleged co-conspirators. As stated in *Flintkote, supra,* p. 386, with respect to the hearsay admission of Ragland:

> "Here we have testimony introduced which goes to the very heart of plaintiffs' cause of action and to defendant's defense. Why did Flintkote terminate the contract? No reason was placed in writing. The only evidence (other than

> the bare refusal to sell, which was equivocal) were the conversations"

The court went on to hold that the admission of Ragland's statement constituted prejudicial error.

The testimony of Bernard Freeman attributing to Mitchell a statement as to Lancaster's reasons for ceasing to do business with Manfree was properly held inadmissible against any of the defendants in this action because here, as in *Flintkote,* there was no independent evidence of conspiracy.

A further ground for not admitting this evidence against any of the appellees is that there was absolutely no foundation laid as to Mitchell's authority to make such a statement. Mitchell, being a salesman of Lancaster, held a position equivalent to Ragland in *Flintkote* who was a "promotional salesman". This court in *Flintkote* said at page 385:

> "The determination of whether or not Flintkote was to contract with the plaintiffs was passed 'upwards' seriatim by Ragland to Baymiller to Thompson to Harkins. Ragland had no executive duties for the corporate defendant, but was a representative at the lower echelon.
>
> "There was an utter lack of proof of or any questioning seeking to establish Ragland's authority to speak on behalf of Flintkote, concerning the alleged incriminating statements of Krause, Howard, and Newport, threatening Flintkote with a boycott."

As with Ragland, Mitchell had no executive duties for Lancaster, but was a representative at the lower echelon, and had no authority to speak for Lancaster concerning threats by Hale.

Further, this alleged statement of Mitchell so far as Borg-Warner, Norge Sales, and the other appellees are concerned, is irrelevant. Taken at its face value, and giving it every possible inference that it could support, it does not mention or implicate Borg-Warner or Norge Sales or any other appellee. The statement proves nothing as to the knowledge or participation of these appellees in the alleged conspiracy to boycott Manfree.

ii. Statement attributed to Ed Bonnet of Graybar Electric Company of Los Angeles.

Mr. Bert Green testified as a witness for appellants. This gentleman was in the coin-operated laundry equipment business in Los Angeles and during at least part of the period 1957 to 1964 handled the Norge line of laundry equipment, purchasing it from the southern California distributor of Norge products, Graybar Electric Company of Los Angeles (Tr. 5460).

Green testified that he was present at a meeting on June 10, 1959 at the Graybar office in Los Angeles at which Mr. Bonnet and Mr. Ash, (representatives of Graybar) were present together with Green and his son (Tr. 5506). With respect to this meeting, Green testified that Bonnet made a telephone call to Lancaster at Green's request, and after the call Bonnet told Green that he had been told that Lancaster didn't care if Graybar sold Green Norge appliances, but that Lancaster wouldn't sell to U.S.E. because it didn't want to "jeopardize a million dollar business with Broadway-Hale." (Tr. 5508-5509).

This testimony was double or triple hearsay. The witness Green testified to a hearsay statement of Mr. Bonnet of Graybar. This hearsay statement was further based upon the hearsay statement of some unidentified person in the Lancaster organization, which in turn relates to further hearsay about what Hale would or would not do if Lancaster sold U.S.E.

Green admitted that he was not in the same room with Bonnet when the alleged telephone conversation took place (Tr. 5508). Therefore, he was not in a position to testify with certainty that such a telephone call was actually made by Bonnet. He could only relate what Bonnet *said* took place. But, assuming that there was such a phone call to Lancaster, there was absolutely no way for appellees to test the truthfulness or accuracy of the statements attributed to Bonnet. Bonnet was not present in court; the person at Lancaster with whom he assertedly spoke was not even identified in a general manner—it could have been anybody from the president of the company to the janitor; and the basis upon which such a person concluded that the Hale's account would be

"jeopardized" if Lancaster sold to U.S.E. was absolutely beyond reach of inquiry.

Green was not a totally impartial witness in that he was a brother-in-law of the founder of U.S.E., Mr. Alpine, and also received a commission on merchandise which he bought for U.S.E. as its buying agent in Los Angeles (Tr. 5504-5505, Pl. Ex. No. 5105). Furthermore, he was thoroughly impeached as to his recollection of the purported phone call to Lancaster (Tr. 5525).

There could hardly be a more graphic illustration of the reason for the evidentiary rule against hearsay statements. As this court noted in *Flintkote, supra,* p. 382, "One of the very best reasons for the hearsay objection is to prevent the presentation of self-serving statements."

Though there are exceptions to the hearsay rule which apply where there is a necessity for the hearsay evidence, (as where the declarant is dead or otherwise unavailable, coupled with circumstances which to some extent provide a substitute for the ordinary test of cross-examination) none apply to this evidence. (Appellants gave no explanation for not calling Bonnet as a witness.) Thus, Wigmore says of the circumstances which give rise to the hearsay exceptions:

* * * * * * *

"§ 1422. *Second Principle: Circumstantial probability of Trustworthiness.*

> The second principle which, combined with the first, satisfies us to accept the evidence untested, is in the nature of a practicable substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name. . . ."

5 *Wigmore On Evidence,* § 1422 (3rd Ed. 1940)

No such extra-judicial guarantees of the truthfulness of the hearsay statements attributed to Bonnet were established. More-

over, where there is hearsay upon hearsay upon hearsay, as is true in the present situation, the trustworthiness of the evidence becomes so uncertain that it must be excluded by the trial court.

Though the court excluded this evidence as to all the other defendants, it permitted it to stand as against Borg-Warner (Tr. 6854). However, in granting Borg-Warner's motion for directed verdict the trial court properly recognized that none of the hearsay statements testified to by Green involved Norge Sales or Borg-Warner (R. 1964).

The statement, taken at its face value, shows a decision by Lancaster not to sell U.S.E. There is not the slightest reference in all of this testimony to Norge Sales or Borg-Warner. Nor is there in it anything from which one could draw an inference that Norge Sales or Borg-Warner knew of any such Lancaster decision, or had any part whatsoever in its formulation. In short, this evidence, though admitted against Borg-Warner by the trial court, proved nothing against that company. The court correctly concluded that it was not such as to entitle the case against Borg-Warner to go to the jury.

As to the other appellees in this case, the statement of Bonnet was properly ruled inadmissible because of its hearsay character. The rules applied by this court in *Flintkote,* cited above with respect to the statement attributed to Mr. Mitchell, apply with equal or greater force to this hearsay statement of Bonnet.

c) The Meeting at the Villa Hotel in 1959 Concerning Transshipment Warranty Charges Does Not Show a Conspiracy to Boycott Plaintiffs, nor Can Any Inference of Conspiracy Be Drawn Therefrom.

For their case against Borg-Warner, appellants rely heavily upon inferences which they claim may be drawn from a meeting in April, 1959 at the Villa Hotel in San Mateo, California between representatives of Lancaster, Graybar of Los Angeles, and Norge Sales.

Present at this meeting were W. J. Lancaster and Gilbert Freeman of the Lancaster Company, Harold Bull and Eugene Schick of Norge Sales, and Ed Bonnet of Graybar Electric of Los Angeles (Tr. 2388, 2983, 5370). The two Lancaster witnesses testi-

fied with regard to the purpose of the meeting and the discussion that occurred (W. J. Lancaster, Tr. 2388-2392; Gilbert Freeman, Tr. 2715-2719). The representatives of Norge Sales also testified with regard to this meeting (Eugene Schick, Tr. 2983-2986; Harold Bull, Tr. 5380-5382 [deposition testimony read into evidence]). In addition to the oral testimony of the foregoing gentlemen, there was also documentary evidence, written at the time of the transshipment in question, showing the events which led to the Villa Hotel meeting and the reasons for that meeting (Pl. Ex. Nos. 4011, 4014, 4019, 4023, 4029).

All of this evidence, oral and documentary, is consistent, and shows that there was only one reason for the meeting at the Villa Hotel, that being to settle the question of whether Graybar should pay to Lancaster the warranty service charge of $17.50 per appliance for merchandise which had been transshipped into the Lancaster distributorship territory at the request of Graybar's customer, Green.[36] This evidence is not contradicted by any other evidence whatsoever. Nor were any of the witnesses who testified with regard to the subject matter of this meeting impeached or discredited in any way.

From this evidence appellants seek to draw the inference that Norge Sales and Lancaster required Graybar to attend this meeting and there compelled it to acquiesce or join in the alleged conspiratorial boycott of Manfree. The fact finder is supposed to infer that Graybar sold appliances to Green's Distributors knowing that they were to be transshipped to U.S.E. until forced by Lancaster and Norge Sales to stop pursuant to a supposed conspiratorial plan to deny Manfree any Norge appliances (Br., pp. 90, 142-143).

It is clear that no such inference can validly be drawn from the evidence in this case. There is simply no evidence that supports

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36. Though appellants refer to this warranty charge as a "fine" imposed by Norge Sales (Br. pp. 51, 90) this is not correct. The billing was not imposed as a penalty of any type. The amount reflected a built-in part of the purchase price to cover warranty costs. In effect, this warranty fund followed the merchandise to assure that the one-year warranty to the purchasing householder was honored.

appellant's theory. All of the evidence is to the contrary, as for instance Pl. Ex. No. 4023 which clearly shows that the Villa Hotel meeting was arranged at the request of *Graybar*, the company that was selling Norge appliances to Green for shipment to U.S.E. Thus, any suggestion that this meeting was arranged by Lancaster and Norge Sales to force Graybar to stop indirectly supplying U.S.E. with merchandise flies in the face of the established facts. Bull's telegram (Pl. Ex. No. 4029) arranging this meeting is dated eleven days after the letter from Bonnet to Bull suggesting that such a meeting be held (Pl. Ex. Nos. 4023, 4029).

Appellants can point to no contrary evidence. All they reply is that they "*urged* that the meeting was held to discuss what to do about Manfree obtaining Norge appliances through Mr. Green and Graybar in Los Angeles" (Br., p. 143). While appellants may thus have formulated a *hypothesis* and a possible explanation of the facts by use of their own imagination, a jury could not be allowed to speculate that the real purpose of the Villa Hotel meeting was other than what all the evidence shows it to have been. A plaintiff cannot go to a jury on the basis of speculation, surmise or conjecture. *Independent Iron Works, Inc. v. United States Steel Corp.,* 177 F.Supp. 743, 746 (D.C., N.D. Cal., 1959), *aff'd.* 322 F.2d 656 (9th Cir.), *cert. denied.* 375 U.S. 922 (1963). Nor may forced and violent inferences be drawn. *Galloway v. United States*, 319 U.S. 372, 395 (1943). Mere speculation must not be allowed to take the place of probative facts. *Safeway Stores v. Farnam*, 308 F.2d 94, 97 (9th Cir. 1962); *Aluminum Company of America v. Preferred Metal Products,* 37 F.R.D. 218, 221 D.C., N.J. 1965).

Nothing can be inferred from the fact that the merchandise in question at the Villa Hotel meeting had been transshipped to U.S.E. on Green's order. No other instances of transshipment of Norge products into the Lancaster distributorship area were shown. The fact that Lancaster asserted its rights under the consumer protection program, proves nothing as to any issue in this case. This court has recognized the validity of warranty charges such as are involved here. *Caterpillar Tractor Co. v. Collins Machinery Co.,* 286 F.2d 446 (9th Cir. 1960).

All appellants have done is to postulate another *possible* explanation for the Villa Hotel meeting. Now they assert that the jury should have been allowed to speculate whether appellants' assertions, unsupported by any evidence, were correct. It is submitted that the facts in evidence with regard to this meeting dispose of any inference of conspiracy to boycott Manfree or U.S.E. just as surely as the facts in *Independent Iron Works v. United States Steel Corp., supra,* disposed of the possible hypothesis of conspiracy urged by plaintiff in that case.

There is absolutely no evidence whatever that Norge Sales or Borg-Warner compelled or even suggested that Graybar stop sales to Green, or that either company prevented or attempted to prevent Graybar from continuing to transship Norge appliances to San Francisco for U.S.E. The uncontradicted evidence with respect to Norge Sales begins and ends with Mr. Bull getting the representatives of Graybar and Lancaster together to settle their differences with regard to payment of the warranty charges by Graybar.

There is no evidence from which a jury could infer that Graybar ceased selling to Green for transshipping on the command or directive of Borg-Warner or Norge Sales. The record does not disclose the reasons for Graybar of Los Angeles ceasing to sell to Green, if in fact it did so. The evidence shows only that Gilbert Freeman and Mr. Schick didn't learn of any further sales of Norge appliances to Green which were transshipped to San Francisco (Tr. 2727, 2729, 2985).

Appellants attempt to draw some inference concerning Norge Sales or Borg-Warner participation in the alleged conspiracy from the fact that in May 1959 Green placed an order for certain Norge appliances with Graybar in Los Angeles (Pl. Ex. No. 4035). Green followed this up with a letter to Norge Sales, dated June 16, 1959 enclosing a copy of the same order (Pl. Ex. No. 4034). Upon receipt of this letter Bull wrote to both Bonnet of Graybar (Pl. Ex. No. 4036) and Mr. Green (Pl. Ex. No. 4037) explaining that most of the order was out of stock. Of course, as already noted, Norge Sales did not sell to retailers in California. Therefore, the request of Green was referred to the independent distrib-

utor of Norge products in Green's area, Graybar. There was no evidence whatever that Bull's statement that the majority of the models ordered were out of production and no longer available was untrue. Nor was there any evidence that Borg-Warner or Norge Sales knew anything at all about this transaction between Green and Graybar of Los Angeles, except for Green's letter to Bull, Pl. Ex. No. 4034. Nor was there any evidence of knowledge by any representative of Borg-Warner or Norge Sales as to the final disposition of this order by Graybar. This is simply another of those transactions which is left hanging in the air, without any proof of connection with any of the appellees or any of the issues in these cases. Appellants again invite pure speculation by the jury as to any link between Graybar's dealings with Green, and either Borg-Warner, Norge Sales, or any other company. The trial court properly refused to allow such speculation. *Independent Iron Works, Inc. v. United States Steel Corp., supra.*

d) All the Other Miscellaneous Activities of Either Borg-Warner or Norge Sales Relied on by Appellants to Establish a Prima Facie Conspiracy Are Without Probative Value.

Appellants' attempt to prove the alleged conspiracy by showing concerted refusals to deal was unsuccessful. The evidence presented a picture of non-parallel behavior by the appellees and alleged co-conspirators with respect to appellants. Beyond this, there was no proof that any appellee or alleged co-conspirator was conscious of the decision by any other company either to deal or not deal with Manfree. (Except, of course, where a manufacturer forwarded the Manfree request for merchandise to its local distributor, as in the case of Norge Sales and Lancaster.)

Appellants, therefore, sought to introduce other circumstantial evidence claimed by them to show at least some uniform or common business activities among appellees and other alleged co-conspirators. From such evidence appellants claim a jury could infer agreement, or at least a knowing commitment to a common plan, the necessary effect of which would be to boycott

them (See Br., pp. 71-74, 104-105, 110, 113, 156-159). The wide range of evidence offered by appellants covered every possible activity and communication that appellees or alleged co-conspirators engaged in during the period 1957-1964. To read appellant's brief one would conclude that everything these companies did was unlawful. The facts themselves present no such picture.

i. Use of manufacturer's suggested list prices by Norge Sales was lawful and created no inference of any antitrust violation.

Basic to appellant's theory of conspiracy to boycott discount stores is their claim that manufacturers, together with distributors and retailers, were attempting to fix prices through the medium of suggested list prices. Appellants charge that manufacturers compelled retailers to advertise at their suggested retail prices (Br., p. 105). This theory, or suspicion, of appellants was not borne out by the evidence.

Nowhere do appellants point to any evidence that Borg-Warner or Norge Sales ever compelled others, whether local distributors or retailers, to follow Norge Sales Suggested List Prices. Norge Sales did distribute price sheets to its distributors which contained suggested retail prices (Tr. 3010-3011, Pl. Ex. No. 1924). There is no violation of the antitrust laws in such a practice. *Klein v. American Luggage Works, Inc.,* 323 F.2d 787, 791 (3rd Cir. 1963); *Susser v. Carvel Corporation,* 332 F.2d 505, 510 (2nd Cir. 1964).

This would be true even if retailers made a regular practice of following these Norge "suggested prices". Here, however, the evidence was that retailers frequently advertised and/or sold at prices other than those suggested by the manufacturers or distributors (Tr. 208-212, 1431-1433, 2000-2002, 3383-3385, 5029).

In the case of Norge products, the evidence shows that sometimes Lancaster followed the Norge suggested prices, sometimes it did not (Tr. 2828-2831). The record is simply barren of anything that suggests that either Borg-Warner or Norge Sales refused to allow the independent distributors handling Norge products to sell to retailers who did not advertise the Norge suggested

retail price. Appellants' suggestion that this was the situation is not in accord with the evidence (Br., pp. 104-105). While Lancaster had a policy of refusing cooperative advertising credits to a retailer unless his advertisements used either Lancaster's suggested price, a weekly term price, or no price (Tr. 2648), there was no evidence that Lancaster ever refused to sell Norge products to a dealer because he advertised prices lower than Lancaster's suggested prices. Nor was there any evidence that Borg-Warner, Norge Sales, or any other company participated in, or had knowledge of, the policy decision by Lancaster respecting allowance of advertising credits.

There is no evidence in the present case that retailers were coerced into using Lancaster suggested prices either as their advertised prices or their actual sales prices by Borg-Warner or Norge Sales. A dealer was under no obligation to advertise at Lancaster suggested prices in order to obtain the Norge product from Lancaster.

Furthermore, neither Borg-Warner nor Norge Sales is responsible for the business policies established by independent franchised distributors of Norge products. Such distributors are not agents of Borg-Warner or Norge Sales. *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943).

ii. The cooperative advertising program of Norge Sales, including the use of Key Account funds, was lawful, created no inference of conspiracy to restrain or monopolize trade, and was not probative of any issue in the case.

Norge Sales had a cooperative advertising program which included various types of funds established by Norge Sales for use by distributors in connection with advertising and promoting Norge Products (Tr. 2672). Co-op funds were made up of money contributed by Norge Sales coupled with distributor matching funds based upon a percentage of the total purchase price paid by the distributor for products ordered from Norge Sales (See Pl. Ex. No. 1924, and Pl. Ex. for Id. No. 53). Norge Sales provided distributors, like Lancaster, with periodic funds designated as Key Account Advertising Funds. These were used by the distributors

in the same fashion as other Co-op funds, the distributor making claims against the funds for part of the cost of retailer advertising. Retail dealers participating in such programs were selected upon the recommendation of distributors (Tr. 2672-2673). These retailers still paid part of their own costs of advertising Norge products. The distributor in making a claim for payment of advertising allowances simply allocated part of its claim to the key account fund, and part to the In-Market Fund (Pl. Ex. Nos. 4101, 4102).

Appellants' elephantine labor with respect to advertising allowances produced a mouse. Nothing in all the testimony elicited from the Norge Sales, Lancaster, and retailer witnesses or in all the documentary evidence offered by appellants with relation to the creation and use of advertising allowances tended to establish either directly or by inference any conspiracy among appellees and alleged co-conspirators to restrain trade or monopolize the sale of major household appliances and television sets (See Tr. 2412-2422, 2670-2697, 2936-2941).

It would be of little assistance to the court, and it would unduly prolong this brief, to review in detail this mass of evidence. It was all irrelevant to the issues of this litigation. Appellants assert that this material shows favoritism toward certain retailers such as Hale, ignoring that their complaint is based upon alleged refusals to deal and inability to obtain certain brands of appliances and TV's, and not on alleged Clayton Act discriminations in allowances. Moreover, there is no evidence that Borg-Warner or Norge Sales used advertising allowances as a coercive instrument to force retailers to do their bidding. There is nothing in all of this material that suggests that Norge Sales ever attempted to compel distributors or retailers to advertise or sell Norge products only at the retail prices suggested by Norge Sales by withholding or threatening to withhold advertising funds from non-complying companies.

Any claim to the contrary by appellants (see for instance Br. pp. 105, 159) is nothing more than the product of pure speculation and suspicion, unsupported by any evidence.

It is submitted that evidence in this case relating to the key account advertising funds established by Norge Sales and administered by its distributors such as Lancaster proves nothing, nor can any valid inferences of any conspiracy to boycott appellants be drawn therefrom. Appellants' speculation that Hale did not use all of the advertising money that was available to it from Lancaster under the 1957 key account advertising program because Lancaster was selling to Manfree during a five month period (May-September) of that year is one of the flagrant examples of the liberties that appellants frequently take with the record. They characterize this as a "refusal" by Hale to use these funds (Br., p. 38). The evidence simply does not suggest a "refusal" to use the funds (Tr. 2899, Pl. Ex. No. 644). Any one of a hundred equally valid possibilities suggest themselves to explain Hale's failure to use the full amount of advertising funds under the key account program.

Further, Pl. Ex. No. 4098G shows that a similar situation occurred in May 1958 with respect to the accounts of Macy's and Breuner's. Yet appellants don't claim that these were "refusals" by these accounts to use advertising funds. Breuner's is not claimed to be a party to the alleged conspiracy to boycott appellants; and, of course, Lancaster hadn't dealt with Manfree for seven months prior to May, 1958. Yet key account advertising funds were not used by these accounts. Why? The evidence is inconclusive, just as it is in the case of Hale in 1957. The jury could draw no reasonable inference from such evidence.

iii. The manufacture of special models of Norge appliances by Borg-Warner, and their use by Norge distributors proved nothing.

The fact that Borg-Warner manufactured special models of various home appliances is without probative value (Tr. 2960). These were variously known as "MP models", "Key account models", "deviation models", or "special models" (Tr. 2960, 2701, 2704-2706). The evidence is uncontradicted that a dealer did not have to be a "key account" dealer to get these models (Tr. 2701).

While Hale purchased some of these special models from Lancaster, so did other dealers (Tr. 835-837).

There is no evidence that Borg-Warner or Norge Sales made any limitation or ruling as to the dealers entitled to purchase these appliances. Nor is there any evidence that they were used in any fashion to coerce dealers to abide by any Borg-Warner or Norge Sales policies.

The only evidence with respect to the manner in which *Lancaster* employed these special models is shown in Pl. Ex. No. 4089. This exhibit shows that in April 1959 Lancaster proposed to use special freezers to promote more sales of Norge products with old accounts, and to interest new accounts in the entire Norge line.

Clearly, such evidence falls short of proving, even inferentially, any conspiracy to boycott appellants. It adds nothing to appellants' case. Even if "favoritism" were an issue in this litigation, this evidence does not prove the existence of favoritism.

iv. Membership in the NEMA and AHLMA Trade Associations and the activities of these associations proved nothing and created no inference of the alleged conspiracy.

Borg-Warner and Norge Sales were members of the American Home Laundry Manufacturers Association [AHLMA]. Harold Bull, the vice-president in charge of sales of Norge Sales, was on the Board of Directors of AHLMA (Tr. 5392-5393). Other appellee manufacturers were also members of this trade association, including General Electric, Hotpoint, Whirlpool, Maytag and General Motors (Frigidaire Division) (Tr. 3483-3485, 2552-2553, 5392-5394). The Association was divided into many committees such as an engineering committee, public relations committee, and committees on foreign freight and ocean rates, industrial relations, and home economics (Tr. 5394, 3501-3502).

Among the projects that this association undertook was the publication of an AHLMA Code of Ethics (Tr. 3485-3487, Pl. Ex. No. 2). Lancaster, as a distributor of Norge home laundry appliances received a copy of this booklet (Tr. 2656). Lancaster required that its dealers comply with F.T.C., AHLMA, and Better Business Bureau recommendations with respect to advertising in

order to qualify for cooperative advertising funds (Tr. 2653, Pl. Ex. No. 4355).

AHLMA also has prepared statistical material with respect to home laundry equipment (Tr. 2551, 5394).

This is the sum total of evidence in this case with respect to Borg-Warner or Norge Sales and their activities in, or relationships with, or knowledge of AHLMA. There is nothing in such evidence that gives rise to any logical inference of conspiracy to boycott appellants.

Borg-Warner was also a member of the National Electrical Manufacturer's Association [NEMA] as were other manufacturers of electrical appliances (Tr. 5410-5411). This organization also engaged in preparation of statistical studies and analyses (Tr. 2551, 5391-5392). These reports or studies dealt with product specifications, and also computations of total industry sales of various electrical appliances by area (Tr. 2551, 4262, 5391-5392). Manufacturer members could use NEMA reports of total sales to compute their individual shares of any given market. General Electric did this, so did Norge Sales. Distributors getting these "penetration reports" would get only their own product percentages and not those of any other company (Tr. 5281-5286, 2800-2805, Pl. Ex. Nos. 149, 5047, 168-173).

Representatives of various manufacturers attended meetings of NEMA (Tr. 5403-5404). The identity of persons attending specific meetings was never established by competent evidence. From the simple facts of membership plus attendance at some meetings, plus receipt of statistical information, appellants would find evidence of conspiracy (Tr. 3032). There is nothing more in the evidence with respect to NEMA meetings or activities.[37] This evidence, like evidence concerning AHLMA, was without probative value and did not constitute any circumstance from which appellants' asserted conspiracy could be inferred. *Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563 (1925).

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37. Appellants offered a mass of documents in connection with AHLMA and NEMA matters which were not admitted in evidence. (See part B.2.(3)(4) of this brief, and Sp. of Err. pp. li-lv.) The documents so offered were properly rejected for lack of foundation with respect to genuineness and authenticity, hearsay, irrelevancy and immateriality.

Many other organizations came under appellants charge that membership therein by various of the appellees or alleged co-conspirators gave rise to inferences of conspiracy. Borg-Warner and Norge Sales were not members of any of these organizations, nor was there any evidence that either of said companies had knowledge of, or any interest in, the activities of such associations. These included the Better Business Bureau of San Francisco (of which U.S.E. itself was a member Tr. 6054); E.I.A. (Br., p. 74); Northern California Electrical Bureau (NCEB) (Br., p. 64); Retail Furniture Dealers Association (Br., p. 64); and Credit Managers Association of Northern California (Br., p. 107).

Lancaster was a member of the NCEB during some part of the period 1957-1964 (Tr. 2814); the Credit Managers Association (Tr. 2408); and the Gas Appliance Society (Tr. 2809). Appellants were unable to produce any evidence from which a jury might infer a conspiracy because Lancaster and other appliance dealers or distributors belonged to these organizations. Appellants established only that Freeman of Lancaster had on occasion met representatives of competitors (Tr. 2811, 2813-2815). From such innocent and meaningless bits of evidence appellants have fashioned their aberration of a conspiracy to boycott them.

B. The Trial Court Properly Excluded Certain Documentary Evidence Offered by Appellants Against Appellees Borg-Warner and Norge Sales.

Appellants attempted to construct a picture of an elaborate scheme whereby appellees and other manufacturers, distributors and retailers of major home appliances and television sets were alleged to be involved in a conspiracy through the medium of suggested list prices, cooperative advertising programs, and various trade association meetings and activities, and pursuant to which discount stores were boycotted. Literally hundreds of unrelated and unexplained exhibits were offered by appellants in order to prove the existence of this hallucinatory conspiracy. These exhibits individually proved nothing; and taken collectively, simply proved the rule that the whole is no greater than the sum of its parts.

The following discussion is limited to those exhibits which were offered by appellants to prove the participation of Borg-

Warner and Norge Sales in any alleged conspiracy. (Sp. of Err. VB. pp. v-xiv)

1. GENERAL PRINCIPLES GOVERNING THE ADMISSION OR EXCLUSION OF THE OFFERED DOCUMENTARY EVIDENCE.

One of the recurring reasons for the trial court's exclusion of proferred documentary evidence was lack of preliminary foundation. Whether or not a sufficient foundation has been laid for the admission of documentary evidence is a matter addressed to the discretion of the trial court. *Metropolitan Life Insurance Co. v. Armstrong,* 85 F.2d 187 (8th Cir. 1936).

"Foundation" with respect of writings has two meanings as applied by the Federal Courts. First, it relates to preliminary proof of authenticity and genuineness; second, it also relates to the admissibility of a properly authenticated document against a party as an adoptive admission. As to the first foundation requirement, federal courts require that where a document is not admissible as a memorandum or record made in the regular course of business, its authenticity and genuineness must be established in accordance with familiar rules pertaining to the authentication of private writings in general. *Standard Oil Company of California v. Moore,* 251 F.2d 188, 218 (9th Cir. 1957). The requirement of authentication means that the proponent of the document must introduce evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is, or the establishment of such facts by any other means provided by law. *California Evidence Code,* §1400.

Federal courts have consistently required such preliminary foundation for the admission of documentary evidence, whether private or public writings. See *Magee v. McNany,* 95 F. Supp. 675, (U.S.D.C., Pa. 1951); *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.,* 265 F.2d 418, 422 (2nd Cir. 1959); *Yaich v. United States,* 283 F.2d 613, 616-617 (9th Cir. 1960). California courts require the same type of preliminary foundation for documentary evidence. *Fishel v. F. M. Ball & Co., Inc.,* 83 Cal. App. 128 (1928); *Gould v. Samuels,* 132 C.A.2d 459, 470 (1955).

The requirement of proof of authenticity of a document is not an idle formality of the law. Special attention must be given to

authentication of documents before permitting them to go to the jury. Most documents purport on their face to be of a certain person's authorship. There must be external evidence of this authorship apart from the mere existence of the document. The fact that a document has been produced from the possession of a party opponent, especially where the document is purportedly signed by some third person, is not sufficient to establish its genuineness. 7 *Wigmore On Evidence,* §§ 2129, 2130, 2160 (3rd Ed. 1940).

With respect to almost every one of the exhibits hereinafter mentioned appellants failed to lay any foundation of authenticity or genuineness. Appellants simply proved, or it was stipulated, that the documents came from the files of a particular appellee or alleged co-conspirator. There was either no showing that the document was what it purported to be, or no showing of the identity of the author, or no showing of the writer's authority to speak for his employer. Sometimes all three elements of foundation were missing.

This leads us to the second definition of the term "foundation." Even had the genuineness of the various documents been established, it was necessary for appellants to show that they were admissible against appellees as adoptive admissions upon some theory of agency. Thus, as noted in *Standard Oil Company of California v. Moore, supra,* p. 218:

> "Extrajudicial admissions of a party-opponent are receivable as exceptions to the hearsay rule. In our case, the documents consist of the writings of employees and agents of the companies against which, at a new trial, they would be produced. To obtain their reception as admissions, it must therefore be made to appear that the statements in question were made or acted upon under circumstances which require appellent corporations to accept responsibility for them as admissions."

Thus, as to writings purportedly written by employees of Borg-Warner or Norge Sales and offered against said appellees, appellants had the initial burden of showing the writer's authority to make statements on behalf of said appellees; or alter-

natively, proving that Borg-Warner or Norge Sales acted upon or adopted or ratified said statements. *Standard Oil Company of California v. Moore, supra;* see also *Arnold v. Thompson & Spear Co.,* 279 Fed. 307, 311 (1922). No such evidence was presented by appellants.

Throughout the trial all appellees made continuing objections to these and other documents offered by appellants on grounds of immateriality and irrelevancy. Although these grounds for exclusion might also be deemed to involve foundation, they will be mentioned separately where appropriate. With this brief review of the principles involved, we proceed to review the particular documents relating to Borg-Warner or Norge Sales which appellants claim were erroneously and prejudicially excluded from evidence.[38]

2. THE RULINGS OF THE TRIAL COURT IN STRIKING OUT OR EXCLUDING CERTAIN WRITINGS OFFERED AGAINST APPELLEES BORG-WARNER OR NORGE SALES WERE PROPER, AND IN ANY EVENT NOT PREJUDICIAL.

(1) Exhibit Number 9024.[39] (Sp. of Err. pp. v-vi; Br. pp. 140-141).

This exhibit and the related testimony of the witness Mittelman concern a statement purportedly made to Mittelman by Mr. Arro, a classified advertising salesman for the San Francisco Examiner. It has nothing whatsoever to do with Borg-Warner or Norge Sales.

Mittelman (produced as a witness for appellants) on direct examination testified that Arro had told him that the Examiner wouldn't take a U.S.E. classified ad "because they don't want to put it in because the downtown stores don't want U.S.E. in the newspaper." (Tr. 2110). This alleged conversation between Mittelman and Arro was objected to by counsel for Borg-Warner on behalf of all defendants on several occasions upon the grounds that there was no showing of authority for Arro to speak for the

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38. The excluded documents are discussed in this brief in the same order in which they appear in appellants' Specification of Errors.

39. The reference to "exhibit numbers" in this portion of the brief refers to "plaintiffs' Exhibit Number for Identification" unless otherwise specified, since none of the subject exhibits were admitted into evidence. Exhibit 9024 was offered and admitted as a Borg-Warner exhibit and subsequently struck out.

Examiner (Tr. 2107, 2108, 2109). The court overruled all these objections (Tr. 2109). Immediately following this testimony of Mittelman counsel for Borg-Warner moved to strike it from the record, as did counsel for Hale. The court at that time made no ruling on these motions (Tr. 2111-2114).

Counsel for appellants then embarked on a series of leading questions concerning this purported conversation between Mittelman and Arro, and over objections of various counsel for appellees, including Borg-Warner's counsel (Tr. 2117, 2119), used Exhibit 9024 for the asserted purpose of "refreshing the witness' recollection"; and by this device was able, after much prodding, to elicit from the witness that Arro had specifically mentioned to him the Emporium, Macy's, Hale and Roos/Atkins (Tr. 2121-2122; 2162).

Counsel for Borg-Warner in cross-examining Mittelman offered in evidence Exhibit 9024 (Tr. 2164). It was offered only as to Borg-Warner, and the record shows that said exhibit was used solely for the purpose of impeaching Mittelman's testimony with respect to what Arro had told him (Tr. 2166, 2171-2173).

The motion to strike the Mittelman testimony was renewed by appellees at the conclusion of the trial (Tr. 6622, 6628-6629). This renewed motion to strike included the memorandum of the conversation, that is, Exhibit 9024 (Tr. 6629). The court subsequently struck the entire testimony of Mittelman with regard to this Arro conversation upon the grounds that it was hearsay, or even hearsay upon hearsay; and upon the further ground that there was no evidence of any authority shown for Arro's statement, and further, that any statement even by an authorized representative of the Examiner could not bind any of the appellees since there was no evidence that the San Francisco Examiner was a co-conspirator in a conspiracy (Tr. 6788, 6855).

Appellants' contention is that any objection to admission of Exhibit 9024 was waived by counsel for Borg-Warner.[40]

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40. Of course, counsel for Borg-Warner could not waive the objections of the other defendants which were properly raised at the time the exhibit was offered.

Appellants cite cases standing for the proposition that objections to incompetent evidence may be waived. However, all of these cases are factually distinguishable. They do not deal with the situation of an exhibit used only for impeachment, where the testimony impeached has been struck out.

In California when a witness is impeached by proof of prior inconsistent statements, the effect is merely to discredit him as a witness. The former statements made by him are incompetent for any other purpose. They do not constitute evidence of the truth of the facts so stated by him. *Albert v. McKay & Co.*, 174 C. 451, 456 (1917).

Also, when a document is used to refresh the memory of the witness, as Exhibit 9024 was used by appellants, the document cannot be admitted as independent corroborating evidence of the witness' testimony. *Hawkins v. Sanguinetti*, 98 C.A.2d 278, 284 (1950). As the court noted in *Hawkins*, "to permit this to be done by the party producing the witness would open the door to the admission of hearsay and manufactured evidence without limit."

Thus, Exhibit 9024 could not be used as evidence of the truth of the facts stated therein to corroborate the testimony of Mittelman. Its only use as independent evidence was as impeachment. Of course, when the court struck out the entire testimony of Mittelman with respect to the Arro conversation, Exhibit 9024 lost any impeachment value. Therefore, the trial court properly struck it from evidence also. In any event, the action of the trial court was not prejudicial inasmuch as appellants could not rely upon this memorandum to prove the statements contained in it. *Albert v. McKay & Co., supra.*

(2) Exhibit Number 431. (Sp. of Err. pp. vii-viii; Br. pp. 72-73, 82, 141-142, App. B).

The exhibit itself consists of two distinct parts: the first being an inter-office communication purportedly from J. S. Sayre of Norge Sales to other employees of the same corporation, dated July 15, 1960, in which Sayre refers to an attached memorandum, and says he will discuss it at a coming meeting. The authenticity of this part was not established. Sayre was not questioned about this memo.

The second part is the attached memorandum entitled "Executive Management Responsibilities In Marketing Practices." Appellants made no attempt to establish any foundation of the genuineness or authenticity of this memorandum. The author's name does not even appear on the document and there was no testimony in this regard. Its only identification is from Sayre's memorandum that it is a paper which was *"handed out"* at a NEMA meeting.

What the evidence *does not* show is significant. Thus, there is no evidence of: (a) the author of the "Executive Management" memorandum; (b) its distribution; (c) its use—whether the subject of a speech, general discussion, or just a "hand out"; (d) the actual conduct of a NEMA meeting on July 14, 1960—no minutes or testimony proving such a meeting were ever produced; (e) Sayre's attendance at any such meeting; (f) the attendance of any representative of any of the appellees or alleged co-conspirators at such a meeting; (g) the topics discussed at such a meeting, or what was said by anyone present; (h) the receipt of a copy or knowledge of the existence of the memorandum by anyone other than Sayre; (i) any action taken by Sayre or any other Norge Sales employee with respect to the comments contained in the memorandum; (j) any action taken by any other member of NEMA with respect to such memorandum; (k) any discussion by Sayre or any other Norge Sales employee with *anyone* showing either agreement or disagreement with the suggestions contained in the memorandum; (l) any similar discussion by any representatives of any of the other appellees or alleged co-conspirators with anyone.

Appellants' sole foundation for admission of this document is that it was found in the files of Norge Sales. The reason for the rule requiring a foundation of genuineness and authenticity before written material can be admitted into evidence is well illustrated by this document. Appellants would have Norge Sales vouching for the authenticity of the unidentified memo, and would also imply said company's indorsement of the statements contained therein, simply because it is attached to an unauthenticated paper purporting to be an inter-office communication of an officer of

Norge Sales. This under the above-cited authorities is simply not sufficient for its admission.

The objection of lack of foundation was properly raised by counsel for Borg-Warner at the time said exhibit was offered in evidence (Tr. 2545, 6468) and the trial court properly excluded it on this ground.

Beyond this, however, the exhibit was properly denied admission because it was irrelevant to any of the issues of this case. Contrary to appellants' assertion that this document shows an attempt by certain of the appellees to establish "a fixed and rigid distribution system in the United States, based in part upon maintenance of list price," the memorandum simply reflects the view of some unidentified person that the appliance industry was in a decline, and his opinion of what might be done to correct this. The memo does not contain any suggestion that manufacturers *agree among themselves* concerning prices to be charged for household appliances. Nor, contra to what appellants claim, does it suggest that manufacturers establish published "list prices" as the advertised retail price (Br. p. 142).

Appellants' interpretation is based upon an out-of-context misreading of paragraph 2 of the memorandum. This paragraph states:

> "2. An area of opportunity to take corrective measures could be activated if manufacturers would follow the following simple rules applied to their distribution pattern with exclusion of government housing:
>
> "a. Establish distributor prices and dealer prices to be used with all retailers regardless of type or volume, and in no instance waiver from these established prices. (This recommendation is only living up to the laws of the land and conforming to Robinson-Patman and the Clayton Act.) . . ."

A fair reading of this paragraph does not permit the interpretation urged by appellants that manufacturers were to agree upon prices or price formulas to be charged for their appliances.

The unknown author of this memorandum says only that in his opinion manufacturers should charge their customers the same price for any given product whether the customer is a large or

small volume buyer, and regardless of the type of customer. Thus, he urges that where a manufacturer sells to a retailer, there be no distinction made as between furniture stores, department stores, discount stores, or other categories of purchasers, and that each manufacturer obey the law and avoid discrimination in price between competing purchasers of commodities of like grade and quality. The author urges that a retailer such as Manfree pay the same price for any given model of appliance as a larger volume dealer (such as Hale)—*thus encouraging market competition, not restraining it.*

The exhibit was properly excluded as irrelevant.

(3) Exhibits Numbers 3006 and 3007. (Sp. of Err. pp. vii-viii).

Both of these exhibits relate to NEMA matters. The first, 3006, purports to be minutes of a NEMA Consumer Products Division meeting of January 6, 1960. This was relied upon by appellants to establish the persons present at the alleged NEMA meeting in July 1960 (Tr. 2543, 6469). No foundation was laid for the admission of this document whatsoever. No witnesses were called or examined as to the execution of this document. The face of the document purports to be minutes, but there is no evidence that these so-called minutes correctly set forth the events of the meeting, if there was such a meeting. Lacking any proper foundation for authenticity, the court properly excluded this document.

Further, the court properly excluded it upon the basis of irrelevancy since it is obvious that minutes of a January meeting cannot either directly, or by any inference, establish who was present at a meeting six months later in July 1960. The content of the document also reveals that it is irrelevant to any issue in this litigation. It does not, contra to what appellants say (Sp. of Err., p. viii), *direct* members to accelerate statistical reports. It states only that members requested a study be made of ways to accelerate reporting of statistical data so as to permit the issuance of summaries with a shorter time delay. Further, appellants' description of this document suggests that NEMA statistical reports show market percentages of all reporting companies. The document does not show this, and it is not the fact. The document on its face is irrelevant, it cannot be twisted into something sinister by

reading words into it that aren't there. It was properly excluded.

Exhibit No. 3007 was excluded upon the same basis. Appellants in their opening brief refer to 3006 and 3007 and numerous other exhibits and claim that they establish the scheme of a "fixed and rigid market system" imposed by manufacturers, and also establish the "motive of said companies to aid and assist in the control of retailers of entry into the San Francisco market" (Br., p. 141). It is submitted that it is utterly impossible for any reasonable person to read Exhibit 3007 as showing or even inferring a scheme such as dreamed up by appellants. Exhibit 3007 is simply a letter memorandum written by Mr. Joseph F. Miller, shown on the letterhead to be the managing director of NEMA, and addressed to the Board of Directors of the Consumer Products Division of NEMA. It states that the Board of Directors of NEMA was confused about the proposed NEMA standard for computing refrigerator capacity and had voted to request the General Engineering Committee of the Household Refrigerator and Freezer Section to review the NEMA standard so as to eliminate all reference to "gross volume." The writer also suggests a sticker to show that a refrigerator is measured by NEMA standards.

This document proves nothing with respect to the existence of a conspiracy to restrain or monopolize trade pursuant to which there was a boycott of Manfree and U.S.E. It is patently irrelevant. As much as appellants would like to have this court believe otherwise, there are legitimate areas of communication among competitors in an industry. *Maple Flooring Mfrs. Assn. v. U.S.*, 268 U.S. 563 (1924). It is submitted that subjects such as elimination of misleading descriptions of product capacity are within the boundaries of legal communication. Such communications do not tend to restrain trade. Rather, they benefit the public, and form an important part of trade association work. Exhibit 3007 was therefore properly excluded on grounds of irrelevancy.

(4) Exhibits Numbers 3022, 3024, 3026, 3029, 3030, 3032, 3036, 3037. (Sp. of Err., pp. ix-x).

This material, in one way or another relating to AHLMA, is of various kinds, including inter-office memorandums of Norge

Sales, statistical data from AHLMA, letters and a memo purporting to be from the president of AHLMA.

With reference to all of the above numbered documents, appellants cite *Standard Oil Co. of California v. Moore, supra;* and *Continental Ore Corp. v. Union Carbide and Carbon Corp.,* 370 U.S. 690 (1962) (Br. p. 142). As shown earlier in this brief, this court in the *Moore* case expressly required proper foundation for the admission of documents. *Continental Ore* is simply inapposite to the question of foundation, since nowhere in that decision is the necessity for establishing genuineness and authenticity of documents discussed. Appellants ignore foundation and argue that the content of these documents proves the alleged conspiracy.

A review of this assorted collection of documents reveals that there is no basis for appellants' claim that these documents, individually or collectively, prove or tend even by inference to prove that manufacturers of major home appliances gathered at AHLMA meetings for the purpose of discussing enforcement of a single price system and a fixed and rigid distribution market throughout the United States (Br., pp. 141-142).

Counsel for Borg-Warner objected to the offer of Exhibit 3022 upon the grounds of lack of foundation and it was excluded from evidence on that ground (Tr. 3039-3041). Appellants' counsel conceded that there had been no evidence as to the foundation of this exhibit (Tr. 6472), and argued that it was admissible without the need for further foundation because it came from files of Norge Sales (Tr. 6473). Significantly, counsel for appellants has failed to cite any authority for this proposition.

Exhibit 3022 shows only the personal opinion of an employee of Norge Sales (his position with Norge Sales was never identified or described) as to the value of representation at trade associations. Contrary to appellants' statement (Sp. of Err., p. ix), Exhibit 3022 does not discuss the desirability of *jointly* controlling production in order to control market conditions. It simply notes that in the opinion of Mr. Homer Travis, Chairman of the Board of Directors of AHLMA, appliance manufacturers should keep close control of their inventories.

Exhibit 3024 is AHLMA statistical data concerning factory sales for the month of July, 1959, and the first seven months of 1959. Statistical computations of this type by trade associations are not in violation of the antitrust laws unless used for the purpose of monopolizing or restraining trade. *Maple Flooring Mfrs. Assn. v. U.S., supra; Cement Mfrs. Protective Assn. v. U.S.,* 268 U.S. 588 (1924). No illegal purposes were here shown. No individual company figures are published in this document. (Nor are they in any other NEMA or AHLMA statistical survey.)

The observations made with respect to Exhibit 3024 apply with equal force to Exhibit 3036, which is a booklet entitled "AHLMA Indicators," and contains only a series of graphs showing industry-wide relationships between inventories and factory sales for various home appliances. Participants in the statistical study are shown, but no figures appear for individual companies.

Appellants' treatment of Exhibit 3026 is a particularly striking example of their frequent misinterpretation of documents. A comparison of appellants' description of what this document contains (Sp. of Err. pp. ix and lv) with the document itself reveals gross inaccuracies by appellants. For instance, appellants describe this document as "commenting on the association's [AHLMA] 'voluntary code covering advertising practices' and *its* decision not to seek Federal Trade Commission review or approval of the program."

In fact, Exhibit 3026 purports to be a letter from Mr. Guenther Baumgart to Mr. Bull of Norge Sales, reporting on a *presentation made by a Mr. Forrest A. Hainline, Jr.,* to the AHLMA Board of Directors. Baumgart says in the letter that Hainline reviewed his *personal activity* in attempting to determine whether or not something could be done on an industry basis to eliminate doubtful advertising practices; that at Mr. Hainline's invitation, meetings of "counsel for a number of companies" were held (the identity of the counsel attending such meetings is not shown either in Exhibit 3026 or by any other means), and as a result thereof Hainline was asked to report to AHLMA's Board of Directors

and *to recommend that AHLMA undertake the development of a voluntary code of advertising practices.* Baumgart's letter further states that Hainline reported that it was the concensus of opinion among the *counsel* at one of these meetings that the Federal Trade Commission should not be approached on the subject of trade practice rules.

To maintain that this exhibit tends to prove a conspiracy among manufacturer members of AHLMA to "establish a fixed and rigid market system" pursuant to which there was a boycott of discount houses in general, and appellants in particular, requires the wildest stretch of the imagination; and even more, a distortion of what the document actually says. The court properly excluded this document as irrelevant.

Exhibits 3028 and 3029 are not accurately described by appellants (Sp. of Err., p. ix).

Exhibit 3028 purports to be a memorandum from Guenther Baumgart to various individuals including Mr. Bull and Mr. Ruff of Norge Sales. By this memorandum, dated July 5, 1960, Baumgart forwards what purports to be a *draft* of the minutes of a meeting of the AHLMA Standards Committee on June 30, 1960. He asks the addressees to inform him whether or not this draft accurately reflects what happened "during that part of the meeting for which you were present." There was absolutely no foundation with respect to the genuineness or authenticity of this document and it was properly excluded on this ground. Furthermore, neither Guenther, nor Bull, nor anyone else was examined with respect to this document. It was incompetent hearsay as to all appellees and objection on that ground was properly sustained (Tr. 6477).

The document was also properly excluded on the ground of irrelevancy. The content of Exhibit 3028 merely reflects a discussion of the pros and cons of a proposed AHLMA standard for laundry appliances, and a question as to whether any such AHLMA standard should be based upon performance, or upon machinery specifications.

Exhibit 3029 is referred to by appellants as an AHLMA document, but it clearly purports to be an inter-office memorandum of Norge Sales having reference to an AHLMA Board of Directors meeting. No foundation was laid for admission of this document. Neither Bull, nor Sayre, nor anyone else was questioned with respect to its authenticity. Further, the content shows the document was irrelevant to any issue here involved. It shows mainly that there was disagreement among members of AHLMA as to the adoption of AHLMA standards for rating washing machines and dryers — the result being creation of a new committee for further study of the laundry industry's requirements in the area of product specifications.[41]

Exhibit 3032 purports to be an AHMLA letter from Guenther Baumgart relating to the exchange of specification sheets. Aside from lack of foundation, the document is absolutely without probative value. The exchange of specification sheets does not even remotely relate to the issues of this litigation. If anything, documents of this sort tend to prove that the NEMA and AHLMA trade associations were used for lawful rather than unlawful purposes. The trial court properly excluded this exhibit.

Exhibit 3037 is referred to in appellants' Specification of Errors and appellants' opening brief but is nowhere described. It appears to be an inter-office memorandum from Bull to a Mr. R. S. Bradley dated April 17, 1963 concerning AHLMA dues and the forthcoming AHLMA budget. There was no foundation laid for its admission. The exhibit was never identified by Mr. Bull, nor was there any other authentication of the document. Mr. Bradley is nowhere identified. In any event, the document is absolutely meaningless so far as any of the issues of this litigation are concerned and the court properly excluded it.

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41. Appellants' statement that this document shows exchange of information about "relative shares of markets" (Sp. of Err., p. ix) is probably based on the statement in the memorandum that the writer learned that Speed Queen accounted for 25% of the industry's sales of wringer washers, Maytag 30%, and his deduction that Speed Queen, Maytag and Norge account for 65% of industry brand sales in 1959. Such material is incompetent hearsay as to all appellees, and in any event has absolutely no connection with the conspiracy alleged by appellants.

(5) Exhibits Numbers 1922, 1923, 3095. (Sp. of Err. p. x).

All of these exhibits are generally described as Lancaster price sheets. Exhibit 1922, consisting of approximately 130 pages, was first offered through the witness W. J. Lancaster (Tr. 2401-2405). This exhibit together with No. 1923 was again offered through the witness Gilbert Freeman (Tr. 2659-2664). The record as to these exhibits and what they mean is hopelessly confused. (See the colloquy between court and counsel, Tr. 6540-6563.) A similar Lancaster price sheet numbered 3095 was offered through the witness Eugene Schick (Tr. 3019).

All that was clearly established concerning these exhibits was that they were Lancaster company doucments. The witnesses W. J. Lancaster and Gilbert Freeman testified that these sheets reflected some sort of dealer classification, but the record shows that appellants' counsel did not pursue the inquiry or in any manner establish the meaning, purpose, or use of the classification system. The trial court properly excluded all of these exhibits upon the ground of lack of foundation (as to materiality and relevancy). Appellants argue that these documents show full notice and knowledge of Borg-Warner as to Lancaster pricing policies and activities in San Francisco; and also, prove control of Lancaster by Borg-Warner in matters of pricing and advertising by retailers (Br., p. 143). However, appellants never get around to explaining how these Lancaster price sheets prove such knowledge or control. There was no evidence that Borg-Warner or any other company had anything at all to do with the preparation or use of these price sheets by Lancaster. No agreement, no control, no direction, no knowledge by Borg-Warner or any other appellee with respect to these price sheets was proved, either directly or by circumstances (e.g., Tr. 3010-3011).

If appellants rely on these price sheets to establish the so-called "list price" conspiracy by manufacturers, their reliance is misplaced. There is no evidence that Borg-Warner or Norge Sales ever compelled or directed the independent distributors of Norge products to follow suggested list prices. The fact that a distributor may have on occasion, or even frequently, followed a

manufacturer's suggested list price in preparing its own price sheets, is probative of no issue in this case. *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3rd Cir. 1963); See *Bailey's Bakery Ltd. v. Continental Baking Company*, 235 F. Supp. 705, 722 (U.S.D.C. Hawaii 1964).

Furthermore, Gilbert Freeman, without indicating any pressure or coercion by Borg-Warner or Norge Sales, testified that Lancaster did from time to time base its suggested prices on the suggested retail prices received from Norge Sales (Tr. 2830-2831). Therefore, these Lancaster price sheets were at best cumulative. The court properly excluded these documents, and in any event, their exclusion was harmless.

(6) Exhibit Number 4028. (Sp. of Err. pp. x-xi).

Exhibit 4028 is a handwritten, unsigned memo and was offered without any foundation for its genuineness or authenticity. There was no attempt by appellants to establish the authorship of this memo. Therefore, there was no foundation for its admission.

Additionally, however, the document simply does not contain the statements attributed to it by appellants. (Br. p. 143, Sp. of Err. p. xi) Appellants claim that this exhibit "clearly shows" that the primary purpose of the meeting at the Villa Hotel was to do something about Manfree obtaining Norge appliances from Mr. Green and Graybar in Los Angeles.

The document does not mention Manfree or U.S.E. In every respect it is consistent with the testimony of witnesses Gilbert Freeman, W. J. Lancaster, Eugene Schick, and Harold Bull that the San Mateo Villa Hotel meeting concerned transshipping between distributors. Therefore, the document was clearly irrelevant, or at the most cumulative of the oral testimony of witnesses and its exclusion was without prejudice.

(7) Exhibits Numbers 643, 645, 3085, 3086, 4092, 4098. (Sp. of Err., p. xiii).

This group of documents are those which appellants say show that Norge Sales and/or Borg-Warner granted direct preferential and discriminatory arrangements to the alleged co-conspirator

Hale. These documents were all properly excluded upon grounds of irrelevancy.

Exhibit 643 is a letter dated January 24, 1957 from a Mr. Collier of Norge Sales to a Mr. Christiansen of Lancaster dealing with the establishment of advertising allowances for Jackson Furniture, Macy's and Hale.

Exhibit 645 is a letter from a Mr. Holter of Lancaster to a Mr. Pavlinek of Norge Sales dated November 5, 1957 which has attached to it a list showing the amount of advertising claims filed during the first six months of 1957 for the same three retailers. Authenticity of these documents was conceded (Tr. 2689).

Even if this litigation concerned alleged violations of Sections 2(d) and 2(e) of the Clayton Act in that advertising allowances were not made available "on proportionally equal terms" to all competing customers, these documents would prove nothing. They were offered by appellants without explanation and without the testimony of any witness whatsoever as to their meaning. By themselves they show no discriminatory practice with respect to advertising allowances. Furthermore, the complaint against the appellees in this case is based upon an alleged conspiratorial refusal to deal, and there is no basis for the admission of evidence which is claimed to show "preferential or discriminatory arrangements."[42] These documents were, therefore, properly excluded.

Exhibits 3085 and 3086 are meaningless so far as the issues in this case are concerned. Exhibit 3085 purports to be the calling card of R. M. Sanford of Hale. This was attached to a memo of a Mr. W. C. Fisher of Norge Sales. Exhibit 3086 is a copy of a letter from Sayre of Norge Sales to Sanford of Hale dated December 8, 1958 expressing regret that Sanford could not attend a reception sponsored by Norge Sales, and suggesting that when Sanford is in Chicago he stop by to see Mr. Sayre. No logical inference of anything can be drawn from these exhibits. What-

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42. Even if such an issue were interjected, Exhibits 643 and 645 are without relevance. Since Lancaster did not sell Norge appliances to Manfree until May 1957, Manfree would be in no position to complain about advertising allowances granted to other customers of Lancaster before that time. Eleven out of fourteen items on Exhibit 645 relate to ads run by Jackson's, Macy's or Hale before May 1957.

ever they might prove was already established by the testimony of Sanford himself (Tr. 529-532). Therefore, the documents were not only irrelevant, but cumulative. Their exclusion was proper, and in any event harmless.

Exhibits 4092 and 4098 were excluded on the basis of irrelevancy. These documents reflect the practice of Norge Sales of holding an annual cocktail party at the time of the January Market in Chicago. Exhibit 4098 is a letter from Gilbert Freeman of Lancaster to Walter Fisher of Norge Sales asking that invitations to the then coming January Market Cocktail Party (1958) be sent to a Mr. Handleman of Macy's and Mr. Sanford of Hale. There is no evidence of how many invitations were issued, or who attended the cocktail parties. There is no evidence that either Sanford or Handleman actually received such invitations, or if received, that they accepted the invitations. The documents prove nothing, and were therefore properly excluded.

(8) Exhibits Numbers 4079, 4080, 4082, 4083, 4084, 4085. (Sp. of Err., p. xliv).

These may be generally described as distributor reports sent from Lancaster to either Norge Sales or Motorola Corporation (depending upon the product involved). These documents report the unit sales to various retailers by the distributor. The record shows that appellants' counsel only questioned Gilbert Freeman of Lancaster concerning document No. 4079 (Tr. 2629a-2631). Exhibit 4079B shows sales of Norge units by Lancaster to the White Front Store in Oakland in December 1963; and Exhibit 4079C is a similar report showing sales to White Front Stores in Oakland, San Jose and Sunnyvale in August 1964. These reports and similar ones offered by appellants showing sales by Lancaster to other discount stores such as GEM and WASCO are probative of no issue in this litigation and were therefore properly excluded.[43]

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43. If they suggest anything, it is that national manufacturers, such as appellee Borg-Warner, had no interest or concern whether their products were sold to discount stores or not, and that there was no conspiracy to maintain "list prices."

Further, even if by some gyration of the brain some logical conclusion could be drawn from these documents as to the sales policy of Lancaster, they would prove nothing as to Borg-Warner or Norge Sales, or any other appellee in this litigation. There is nothing in these documents that indicates that either Borg-Warner or Norge Sales or any other company in any manner directed or controlled or even tried to influence Lancaster's selection of customers.

(9) Exhibit Number 4108. (Sp. of Err. p. xlix).

This exhibit consists of two cards which appellants characterize as "Lancaster desk order cards." Gilbert Freeman was the only witness questioned concerning this exhibit and testified that he had never seen these cards before and didn't know what they were (Tr. 2626-2628). No other foundation as to authenticity or genuineness or as to the business record character of Exhibit 4108 was offered. Therefore, this exhibit was properly excluded.

(10) Exhibit 1773. (Sp. of Err., p. xlv).

During the examination of Bernard Freeman it was stipulated that Exhibit 1773 was the same in content as Exhibit 1722, previously admitted in evidence. It was further stipulated that Exhibit 1773 had been received by Norge Sales in December 1963. Upon this basis, counsel for appellants voluntarily withdrew Exhibit 1773 (Tr. 5950-5953).

C. The Trial Court Correctly Excluded Portions of the Deposition of Arthur Alpine.

Certain portions of the Deposition of Arthur Alpine, the deceased founder of U.S.E., were excluded from evidence. These portions concerned Alpine's alleged conversations with many persons, most of whom were representatives of one or another of the appellees or alleged co-conspirators. The reason for exclusion in most instances was that Alpine had died before there was an opportunity for appellees to cross-examine him on the various memoranda relating to these same alleged conversations (Tr. 6224-6225, 6229-6230, 6251-6252).

The failure to cross-examine on these memoranda was not due to the fault or waiver of appellees, but to the obstruction of appellants' counsel who refused to produce any of the memoranda, claiming they were privileged communications (Tr. 6219-6221). By the time an order for production of these memoranda was obtained Alpine had died (Tr. 6224).

The trial court properly exercised its discretion in excluding the Alpine testimony concerning these alleged conversations. *Continental Can Company v. Crown Cork & Seal Inc.,* 39 F.R.D. 354 (E.D. Pa. 1965). No general rule can be laid down with respect to unfinished testimony. If *substantially complete,* it should be admitted with proper instructions to the jury. *Derewecki v. Pennsylvania Railroad Company,* 353 F2d. 436 (3rd Cir. 1965). It is submitted that Alpine's deposition was *not* substantially complete so far as the subject conversations are concerned because there was no opportunity to interrogate him with respect to the memoranda of such conversations.[44] Such cross examination would most probably have developed serious doubts about Alpine's personal recollection of the alleged conversations. (For instance, Pl. Ex. for Id. No. 550.)

Appellants cite *Re-Trac Corp. v. J. W. Speaker Corp.,* 212 F. Supp. 164 (E. D. Pa. 1962) in support of their position where the court admitted the incomplete deposition of a deceased officer of defendant under the rule "favoring admissibility of evidence in doubtful cases." However, the *Re-Trac* case is not applicable to the Alpine Deposition because there is nothing *doubtful* about the propriety of the trial court's ruling in light of appellees' inability to examine Alpine concerning the memoranda of the very conversations about which he testified. While the court in *Re-Trac* noted that plaintiff had "not indicated with particularity the area and scope of the matter not completely investigated," in the present case the matter not examined upon was precisely spelled out.

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44. The trial court did not exclude the whole Alpine deposition. Part was in fact read to the jury (Tr. 6181-6212). Upon the exclusion of those portions of the deposition relating to conversations about which memoranda had been written appellants' counsel chose to forego reading any other portions of the deposition (Tr. 6277).

Contrary to appellants' assertion that appellees delayed an unreasonable period of time in attempting to obtain these memoranda (Br. p. 155), demand was made for such material by item 12 of the Subpena Duces Tecum served on Alpine in February 1961 even prior to his deposition (R. 178-182). Appellants' motion to quash portions of this subpena did not mention item 12 (R. 173-174). Further demand for the memoranda was made during the deposition in May 1961, which appellants refused (Tr. 6219-6221). Interrogatories going to the identification of these memoranda were served on appellants on January 2, 1962 (R. 229a-c). Responses to these interrogatories were filed by appellants after an extension of time had been granted to them which amounted to a re-assertion of the claim of privilege (R. 230-231). That same month Alpine died (Tr. 6224). Between the time of the Alpine deposition and January 2, 1962 appellees were not merely sitting on their hands. Six days of deposition of Bernard Freeman were completed, answers to appellants' extensive interrogatories were prepared and filed (e.g. R. 197, 210) and answers to appellants' Second Interrogatories Addressed to Borg-Warner were prepared and filed (R. 222).

Moreover, with respect to Borg-Warner and Norge Sales the conversations either ruled out by the court or voluntarily not read by appellants proved nothing concerning the knowledge or participation of said appellees in the alleged conspiracy. Therefore, the exclusions were proper, and in any event not prejudicial.

Appellants refer to an alleged Alpine conversation with "representatives of Borg-Warner" (Sp. of Err. VIII H(e), p. xxxvi). This conversation was purportedly with someone from the Borg-Warner Acceptance Corporation. The conversation consisted of an introduction, and a request by Alpine to have this unidentified person see what he could do about getting Lancaster to sell Norge products to Manfree. (Alpine Deposition pp. 191, Ln. 25 — 195 Ln. 16). This portion of the deposition was excluded because there was no evidence with respect to the identity of Borg-Warner Acceptance Corporation (or Borg-Warner Credit Corporation), or what connection it had with this case (Tr.

6235).[45] The exclusion was proper, and in any event without prejudice as the omitted conversation was without probative value.

Appellants also complain of exclusion of portions of the deposition dealing with purported conversations with representatives of Lancaster (Sp. of Err. VIII H(g), p. xxxvii). The following observations are pertinent to this claim of error:

1) The alleged conversation with Mitchell of Lancaster: there was a memorandum of this conversation and no opportunity to cross-examine thereon (Alpine Deposition pp. 274-275). It was properly excluded by the trial court (Tr. 6256). In any event the conversation proved nothing with respect to Borg-Warner, Norge Sales, or any other appellee. It was inadmissible hearsay, and was offered without any foundation of the authority of Mitchell to speak for Lancaster.

2) The alleged conversation with Al Schmidt, the Motorola salesman for Lancaster: there was likewise a memorandum of this conversation (Alpine Deposition p. 278) which appellees were unable to cross-examine upon. It was properly excluded (Tr. 6261). Furthermore, the content of the alleged conversation was inadmissible hearsay, and irrelevant as to all appellees.

3) The alleged conversations with Mitchell of Lancaster respecting cooperative advertising funds for U.S.E.: there was no memorandum with respect to this testimony and the court authorized this portion to be read (Tr. 6266). However, appellants chose not to read this into evidence (Tr. 6277). Appellants distort the content of this alleged conversation. The Alpine testimony was only that Lancaster would not give cooperative advertising money for U.S.E. newspaper ads. (This is not surprising if U.S.E. truly advertised at prices below list price, because Lancaster had a policy of refusing cooperative advertising money to all dealers for ads specifying prices below Lancaster's suggested list price. (Tr.

45. Actually, the correct name of the company that Alpine probably had reference to in this testimony is "B-W Acceptance Corporation," a Delaware Corporation whose stock was wholly owned by Borg-Warner. This company was not named as a defendant in these cases, nor was it ever charged with being an alleged co-conspirator.

2407). In any event, the conversation was irrelevant and appellants' oversight in not reading this portion of the deposition did not affect their case.

D. The Trial Court Properly Dismissed Norge Sales From Action No. 42674 Upon Motion for Summary Judgment.

Appellants' Specification of Errors IV charges that the trial court committed prejudicial error in dismissing appellee Norge Sales from action No. 42674 on its motion for summary judgment. The first complaint filed August 12, 1960 did not name Norge Sales as a defendant, but the second complaint filed August 4, 1964 did. After full discovery was had by appellants, Norge Sales moved for summary judgment on May 17, 1965 upon the ground that action No. 42674 was barred as to it by the applicable four year statute of limitations, to wit: 15 U.S.C., § 15(b).[46] Summary judgment in favor of Norge Sales was entered on June 14, 1965 (R. 165).

Contrary to appellants' statement that the dismissal was based on the grounds that Norge Sales had not been sued "within four years from the alleged beginning of the conspiracy", (Br., p. 15) the summary judgment was granted because the court found that there was no overt act on the part of Norge Sales within four years prior to the filing of action No. 42674 which caused or resulted in injury or damage to appellants (R. 165).

While the effect of a conspiracy in a civil antitrust action is that each defendant is charged with the acts of the co-conspirators, this does not alter the operation of the statute of limitations. Thus, when an overt act causes an injury, the Statute of Limitations commences to run, and an action not brought within the time period allowed will be barred as to the conspirator who actually com-

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46. 15 U.S.C., § 15(b) provides as follows:

"Any action to enforce any cause of action under sections 15 or 15(a) of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15(a) and 16 of this title shall be revived by said sections." (Effective January 7, 1956)

mitted the wrong and all co-conspirators equally responsible for such wrong. *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 154 F.Supp. 216 (D.C. Minn. 1957).

The court in *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 197 F.Supp. 333, 338 (D.C. Ala. 1960) *aff'd* 295 F.2d 362 (5th Cir. 1961) stated:

> "The Court is of the further opinion that recovery in this action may not be predicated upon the theory that the original refusal to deal is in the nature of continuing tort or done pursuant to a continuing conspiracy. If the laws were otherwise, there would be no field of operation for a limitations period."

Appellants contend in effect that each day from August of 1960 to August of 1964 there was a new refusal to deal by Norge Sales constituting a new overt act causing injury to appellants. The only overt acts of Norge Sales that appellants pointed to during the period August, 1960 to August, 1964 were the replies to demand letters of plaintiffs written in 1961 and 1963 (Tr. Hearing of May 29, 1965; P. Tr. 50-52).

Appellants rely upon *Flintkote Company v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957) to sustain their position. However, that case did not involve the question of the statute of limitations, but rather dealt with a question of damages, and therefore is clearly not applicable to the Norge Sales situation.

As to the statute of limitations and its application to continuing refusals to deal, the case of *Garelick v. Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963) sets forth the applicable rule.

In *Garelick,* the plaintiffs were distributors of defendant. Defendant notified plaintiffs by letter that it would cease doing business with them on October 1, 1956, which it subsequently did. Plaintiffs commenced an action on January 17, 1962. To avoid the bar of the statute of limitations, plaintiffs filed affiidavits concerning overt acts which they claimed were committed within the four year period of limitation. One of the acts relied upon was a request by plaintiffs to be reinstated as a distributor coupled with defendant's failure to do anything about it. In sustaining a summary judgment for defendants, the Court held:

> "The conduct on these two occasions might be overt acts but obviously the plaintiffs-appellants were not in any way injured or damaged thereby. The incidents were simply acts that reflected that defendant-appellee continued in refusing to sell its products to plaintiffs-appellants."

The similarity between the *Garelick* overt acts and the Manfree "demand letters" of 1961 and 1963 in the present litigation is apparent.

Once a conspirator commits the damage-inflicting overt act (here the alleged initial conspiratorial cut-off) the injured party cannot abrogate the statute of limitations by treating a continuing refusal to deal as a series of separate, independent, consecutive damage inflicting overt acts. In such a situation *damages* simply continue to accrue from the original damage-inflicting cut-off. If the injured party fails to complain within four years of the initial cut-off, his action is barred even though he may have suffered damage from such overt act as recently as the day before the complaint is filed. See *Sherman v. Goerlich's, Inc.,* 238 F.Supp. 728 (E.D.Mich., S.D., 1963), *Aff'd per curiam,* 341 F.2d 988 (6th Cir. 1965).

Appellants are correct in stating that any conspirator may be added as a party and may be held liable for damage inflicted by overt acts of the conspirators committed within four years of the time such party was joined (Br., p. 136). But appellants overlook the heart of their proposition: that the party must be joined within four years of the *injury-inflicting* overt act. Here Norge Sales was not joined within that time limit. The initial "refusal" of Norge Sales to sell Norge appliances *directly* to Manfree occurred at least as early as July 11, 1960 (Pl. Ex. No. 1772). Since appellants failed to point to any damage-inflicting overt act by any of the alleged conspirators within four years from the time Norge Sales was named as a defendant in action No. 42674, appellants' cause of action as to said company was barred by 15 U.S.C., §15(b).

E. Appellants Were Not Denied Discovery of Any of the Documents Sought by Their Motions to Produce With Respect to Either Borg-Warner or Norge Sales.

Appellants complain that they were denied discovery of certain documents enumerated in item 15 of "Plaintiffs' Motion for the Production of Documents Addressed to Factory Defendants" filed in June, 1964 (Br., pp. 172-173, Sp. of Err. VIII C). Borg-Warner filed a response to this motion alleging that none of the documents called for by appellants were in the possession, custody or control of Borg-Warner (R.537-539). This was supported by the affidavit of the vice-president and general counsel of Borg-Warner (R.511-553). On the basis of this showing the trial court properly denied the motion with respect to Borg-Warner (R. 607-608).

Similarly, appellants claim prejudicial error in the trial court's ruling with respect to items 20, 22 (c)-(e) and 27(f) of Plaintiffs Motion for the Production of Documents Addressed to Factory Defendants" filed in November, 1964 (Br., pp. 175-176, Sp. of Err. VIII G). Borg-Warner filed a response to this motion stating that it relied on its responses to the earlier motion to produce; that is, that it didn't have possession, custody, or control of any of the documents sought by appellants; and that so far as Norge Sales, such items as existed were identified in the depositions of Sayre and Bull and were in the process of being collected (R. 918-920). On this basis the trial court denied the motion as to Borg-Warner, and ordered Norge Sales to produce such documents as identified in the Sayre and Bull depositions (R. 982-983). This material was subsequently produced, as evidenced by the numerous exhibits offered by appellants from the files of Norge Sales. (e.g. Pl. Ex. for Id. Nos. 3022, 3024, 3026, 3028, 3029, 3085, 3086, 431, 643; Pl. Ex. Nos. 1924, 4058, 4059.)

Appellants make no claim that either Borg-Warner or Norge Sales actually had any of the type of documents called for in these items of their motions to produce beyond what was produced by Norge Sales. Therefore, appellants were not prejudiced by any

ruling of the trial court with respect to discovery relating to Borg-Warner or Norge Sales.

CONCLUSION

Based upon all of the foregoing facts and law it is respectfully submitted that this court should affirm the judgements of the District Court in favor of appellees Borg-Warner Corporation and Norge Sales Corporation.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William S. Clark